

**ALTA TITLE COUNSEL
SPRING COMMITTEE MEETING**

**InterContinental Hotel
Montreal, Canada
April 28-30, 2002**

CALL TO ORDER FROM CHAIRMAN JIM KLETKE, STEWART TITLE GUARANTY COMPANY, AND INTRODUCTIONS

COMMITTEE BUSINESS AND ANNOUNCEMENTS

- a. Meeting logistics and information
 - b. Next meeting dates, location, format: New Orleans, LA, Nov. 3-5, 2002
 - c. Designation of Recording Secretary for the meeting
 - d. Approval of Minutes from November, 2001 meeting (**Exhibit 1**)
2. ALTA GOVERNMENT AFFAIRS REPORT (Maher, on behalf of ALTA Legislative & Regulatory Counsel Ann vom Eigen) (**Exhibit 2**)

FORMS COMMITTEE REPORT (Maher, Klarin)

RECENT CASES

NB **Bullet** indicates other significant cases not part of meeting agenda included for the Benefit of the Title Law Associates Newsletter subscribers

- ABSTRACTORS LIABILITY – Privity of Contract Rule v Established Tort Principles

Valentine v Willard & Associates Title Search Services, 2001 WL 733414 (Ohio App. 5th Dist)

Issue: Since buyer, seller and title company rely upon title abstractor to properly search the record and disclose defects, liens or encumbrances on title, does the established tort principal, that a party performing a specialized expert service in a business transaction have liability for negligence to those who rely upon such expertise apply, when search fails to disclose defects?

Held: Seller may not sue title searcher for error.

Comment: Abstract Company may not be sued except by the party to whom the abstract is issued. Because the Valentines were the “sellers”, they were not in privity of contract. In Ohio a claim against a title abstractor “must be founded on contract” and is not a negligence claim.

NB Compare this to *Barnstad v STG*, 39 P3d 984, Agenda item 18, Exh, 31 (No Duty to Disclose) this issue and *Hulse v. Fatico*, 2001 WY 95, 2001 WL 1203220 (WYO) Exhibit 11(b) Fall 2001 ALTA Title Counsel Meeting.

ADMISSIBILITY OF EVIDENCE OF INSURANCE COVERAGE

- a. *Lombard v. Rohrbaugh*, 551 S.E.2d 349 (Va. 2001) (Davis) **Exhibit 3**

Comment: In a case of first impression in Va. the S. Ct. has held that an expert witness may not be cross examined as to their relationship with insurance carrier under claim of bias.

6. AGENTS – AUTHORITY AND ACTIONS

- a. *National Mortgage Warehouse v. Bankers First Mortgage Co.*, 2002 WL 386263 (USDC Md., 2002) (Kletke) **Exhibit 4**

Comment: This case illustrates the need to review and determine the scope of an agent's authority. In this case the U.S. District Court in Maryland upheld 2 important legal principles of the law of closing protection letters: (1) a closing protection letter affords no protection for a closing which occurs after the letters stated expiration date [in this case 1 year]; and (2) a closing protection letter affords the lender no protection in a transaction for which the lender has not ordered title insurance from the company that issued the letter. In this case the Court determined there was no liability incurred by the title insurer under a fraudulent scheme because the CPL had expired and was therefore ineffective, the lender was not an insured party and there was no policy issued.

- b. *Lawyers Title Insurance v. Rex Title Corp.*, 2002 U.S. App. LEXIS 2911 (4th Cir. 2002) (Davis) **Exhibit 5**

Issue: Suit in negligence rather than for breach of contract.

Comment: In this case the 4th Cir. Ct. of Appeals determined that a title insurance agency may be sued in negligence, rather than for breach of contract, where it failed to obtain a release of lien as so instructed to do by the underwriter, before issuing the policy. The general rule in MD is that one may not sue in negligence solely in contract. However, in this case the 4th Cir. Appellate Ct. determined that the agent had *both a duty under the contract and an independent duty to perform services*, in which case a negligence action is permitted.

AGENT LIABILITY

- a. *Property Flipping in Baltimore: a Prosecutorial Perspective*, J.L. Evans, Maryland Bar Journal, March/April 2002 (Rush) **Exhibit 6**

Comment: refer to Spring 2001 TLA Newsletter lead article tracing the history of flip transactions and Spring ALTA Title Counsel Agenda, Exh 55. 55

AUTHORITY TO TRANSFER

- a. *Seay v. Seay*, 805 So2d 515 (Miss. 2002) (Matrick) **Exhibit 7**

Comment: This case discusses the issues of delivery and proper use and execution of Powers of Attorney. 4 warranty deeds were found in the decedents purse at the time of her death. There was not evidence of delivery or recordation of these prior to death. The prior POA executed by the decedent's children did not authorize the execution of deeds and were thus void ab initio

NB this case illustrates that certain elder law estate conservation practices undertaken by elder law counsel for the purpose of facilitating land management often do not work *if the vested remainder is subject to de-vestment*, a concept which some lawyers either don't understand or fail to consider.

BAD FAITH

- a. *Hamilton v. Maryland Casualty Co.*, Contra Costa Co. Super. Ct. No. C94-05338 (Rush) **Exhibit 8**
- b. *Showpiece Homes Corp. v. Assurance Company of America*, 2001 WL 1598369 (Co. 2002) (Uecker) **Exhibit 9**

Issue: Are insurance companies in Colorado subject to the Consumer Protection Act [CPA] or only the Unfair Claims Deceptive Practices Act [UCDPA]? Does the UCDPA preempt a private cause of action by an insured against an insurer under the CPA?

Comment: The CPA is complimentary to the UCDPA and should be broadly construed.

BANK LIABILITY

- a. *First National Bank v. Pack*, 789 So2d 411 (4 DCA 2001) (Daniels) **Exhibit 10**

Issue: This case concerns a construction loan and raises the issue(s) of whether a bank incurred a fiduciary duty and then breached that duty when its borrower/customer asked bank to intercede on their behalf to correct certain builder deficiency's and the bank agreed to do so and then failed to perform.

Comment: The court determined: there was sufficient evidence that the borrower/customer were justified in placing their confidence in the banks and its representations; that the bank accepted that trust, creating a fiduciary duty on the bank's part; and that the bank breached that duty when it failed to disclose knowledge of the builders financial problems.

- b. *National Title Insurance Corp. Agency v. First Union*, 559 S.E. 2d 668 (VA 2002) (Daniels) **Exhibit 11**

Comment: Virginia S.Ct. says parties can contractually shorten UCC-1 period for examining checks and reporting unauthorized signature or authorization. Where escrow

account deposit agreement requires title agency to notify bank within 60 days of receipt of its monthly statement if a check paid by the bank was unauthorized and agent fails to do so within period contracted for, the title agency may not collect from its bank for having paid two counterfeit checks.

BANKRUPTCY

- a. *In re Kolich*, 2002 WL 252475 (8th Cir. (Mo.)) (Rush, Uecker) **Exhibit 12**

Comment: Significant case interpreting the proper avoidance of judgment lien in bankruptcy under 522(f)(2)(A)

- b. *In re Yury*, US Bankr. N.D. Calif. No. 01-11202 (Cavallaro) **Exhibit 13**

Comment: Another case regarding statutory lien avoidance v. judicial lien avoidance.

- c. *In re Motley* 268 B.R. 237 (Calif. 2001) (Kletke) **Exhibit 14**

Issue: Bankruptcy-Discharge of Debt-Esrowed funds and Escrow and Indemnity agreement. The difficult issue here is to determine how to treat the indemnity agreement between the debtors and Firstam.

Background: Debtors received a Chapter 7 discharge. Property was therein scheduled. Thereafter former debtor sold real estate and lender required a title insurance policy showing the D/T in first lien position. Search disclosed Debtors had previously made a pre-petition guaranty of corporate debt. Thereafter, in a separate state court action a post-petition state court judgment was entered based on the debtor's pre-petition guaranty. Title Insurer, as an inducement to insure over said proceedings, required the discharged debtor/sellers to deposit funds equal to the amount of the judgment plus accrued interest and enter into an escrow agreement and separate indemnity agreement. The indemnity agreement provided that if a demand was made for payment of the judgment the title company could pay the judgment directly if it was not satisfied with 120 days and refund the balance, if any, to the depositor. Shortly after closing demand was made for payment of the judgment. Firstam paid the judgment *from its own funds* [NB not the escrowed funds, which remained in the escrow account]. Thereafter former debtors promptly made motion in state court to vacate the judgment entered against them on the grounds that it violated their discharge and further argued that Firstam was not entitled to apply the deposited funds in reimbursement for paying the judgment claim because that claim had been discharged in the prior bankruptcy proceedings. Firstam countered contending that under the indemnity agreement the depositor bound themselves to "satisfy" the discharged debt and that if they failed to do so faced loss of the funds. The court found in favor of the depositor holding that, notwithstanding the existence of the indemnity agreement, a debtor cannot contract to pay previously discharged debt absent the execution of a reaffirmation agreement, which agreement must be made *before discharge*.

Held: Funds deposited with title company are property of debtor/depositor and are to be returned.

Comment: This case is illustrative of the use and misuse of escrow and indemnity agreements. **Practice Rule:** Exercise extreme caution when title is

coming out of a former bankrupt and there are separate but concurrent actions filed in state court to enforce liens. Be certain there are not violations of the discharge and that the case is "Closed". Structure the escrow agreement so that the Title Company reserves the right to unilaterally *pay the escrowed funds into court*, thereby absolving itself from any further disposition.

d. *In re Lewis*, 270 B.R. 215 (Bankr. W.D. Mich., 2001) (Kletke) **Exhibit 15**

e. *In re Thomas*, 2001 U.S. Dist. LEXIS 22102 (E.D. Va.) (Davis) **Exhibit 16**

Comment: This case involves a Chapter 7 proceeding where property was held as tenant-by-the-entirety. There was a joint filing of petition by both parties. Homestead was claimed as an exemption. Trustee sought to sell property to property for the benefit of creditors. Court held that under Va. Law property held as tenants-by-the-entirety is not subject by attachment by individual creditors.

NB This case is now on appeal before the 4th Cir. No one knows what affect, if any, the USA v. Craft decision may have. Also see the Dirt Post of 5/7/02 suggesting there may be substantial homestead exemption changes in the wake of Enron.

f. *In re Lane*, 280 F.3d 663 (6th Cir. 2002) (Davis) **Exhibit 17 [Dirt DD for 2/26/02]**

Comment: This is another lien stripping case where the 6th Cir. held it is permissible to strip-off a second mortgage if there is no equity in the property. Where value of residential real estate is less than the amount of the first lien, junior liens on the property can be "stripped away" and become unsecured claims, as they are not "secured" by residential real estate when no value supports the lien.

g. *In re Canney*, 2002 WL 362658 (2nd Cir.(Vt.)) (DeFrances) **Exhibit 18**

Comment: This case involves the conversion of a chapter 11 debtor to a chapter 7 debtor. Mortgagee, which had obtained a pre-petition foreclosure judgment, moved for a relief of stay and argued that the debtor-mortgagor's equity of redemption had expired while the Bcky. Case was pending. The court discusses what is the time certain upon which title vests and the period of redemption tolls. i.e., law day under 363(a) or 60 days under 108(b).

h. *In re Altmeyer*, 268 B.R. 349 (Bankr. W.D. N.Y. 2001) (Davis) **Exhibit 19**

Comment: This case discusses the issues of bankruptcy, fraudulent transfer and reasonably equivalent value ***in light of a marital settlement agreement***. The court determined that a transfer of property to a souse by deed in a divorce settlement, given to facilitate a mortgage solely in the grantee's name, which transfer occurred less than a year before grantor's bankruptcy filing, was a fraudulent transfer where the parties made record statements at the time that the deed had been given for no consideration and where the grantor had many creditors and was insolvent.

BROKER'S LIEN

a. *Second District West Suburban Bank v. Attorneys' Title Insurance Fund*, 2001 Ill.

CLOSING PROTECTION LETTERS

- a. *GE Capital Mortgage Services v. Privetare*, 788 A.2d 324 (N.J. App. 2002) (Davis, Kletke) **Exhibit 21**

Comment: This case distinguishes and narrowly circumvents the Sears case regarding attorney defalcations where vendee does not purchase an owner's policy. In this instance buyer (unlike in Sears) is not a 3rd party beneficiary to lenders CPL where no owner's policy is issued.

- b. *National Mortgage Warehouse, LLC v. Bankers First Mortgage Co.*, CCB-00-2881 (D. Md. 3/8/02) (Davis) **Exhibit 22**
NB see Agenda item 6 (a) Exh 4 above

CONSERVATORSHIP-SALE OF PROPERTY WITHOUT COURT ORDER

- a. *Scott v. Nelson*, 2000 WL 85766 Miss. App. (Matrick) **Exhibit 23**

Comment: Executor and sole devisee of individual's estate brought action to set aside deed to property conveyed prior to individual's death while individual was under conservatorship. Deed was conveyed by person under disability to co-conservator. No court order was obtained. Grantee thereafter sold property to third party who claimed to be a bona fide purchaser for value without notice. The Court held that the deed became void ab initio when deeds legality was challenged by executor and sole devisee of the individual's estate. NB There was not discussion in the case of consideration, if any, in the first deed.

- CONSTRUCTIVE TRUST-LIS PENDENS-SUIT DOES NOT AFFECT TITLE

Gutto v. Patane, 2001 WL 161762 (Cal.App. 1 Dist.)

Issue: Did the Lis Pendens impart constructive notice?

Comment: No. A suit to impose a constructive trust on property, accompanied by a lis pendens with a wrong legal description, is not an action about real estate and the suit does not affect title.

COVENANTS

- a. *Martin v. Beldean*, 2001 WL 1314903 (Mich. App.) (Uecker) **Exhibit 24**

- b. *Maryland Attorney General's Opinion*, Feb. 13, 2002 (Davis) **Exhibit 25**

Comment: This should have been placed under Bankruptcy. This opinion addresses multiple issues the most significant of which relates whether the Federal Bankruptcy Court can pre-empt ad valorem real estate taxes pursuant to 11 USC 1146(c). See Article 11 of the Constitution of the United States. There was a discussion on "free and clear"

orders. Quaere: Even if the Board of Supervisors are named and served, is that sufficient or must the taxing authority actually make an appearance, thus subjecting themselves to the jurisdiction of the Bankruptcy Court? NB The **general title rule** is to insist that the taxes be paid. NB Prior to the tax provisions included in the Bankruptcy Reform Act of 1994 we were of the opinion the trustee could sell property free and clear of ad valorem real estate taxes providing he met the requirements of 363(f) and the "free and Clear" order specifically stated that the sale was to be free and clear of such tax liens. We relied on the cases cited in The Law of Titles in Pennsylvania, Chapter 4 [Tax Lien subsection]. In light of the 1994 Amendments those cases can not longer be relied upon

16. DEEDS

a. *Alexander v. McClellan*, 2001 Colo. App. LEXIS 2015 (Kletke) **Exhibit 26**

Comment: This case could just as easily been listed under STREET [U-223]. The case involves the sale of property abutting a vacated roadway. Sale was made and the deed description made reference to only a filed lot and block. No reference was made to the vacated roadway. A dispute arose as to property ownership. The Supreme Court note the general rule of law that upon vacation of a roadway, the owners of the abutting property become the fee owners up to the center line of the vacated roadway. However, the court held that a deed drawn subsequent to the vacation, which describes the transferred property by lot and block only, **does not** divest the grantor of its title to any portion of the vacated streets. Various treatise are cited including Patton on Titles (2d ed. 2000) edited by Joyce Palomar and Tiffany, The Law of Real Property, sec 996 (3d ed. 2000).

NB This case should be included within the Master Claims Litigation Index appearing on the TLA web site.

b. *Kerr v. Fernandez*, 792 So2d 685 (3 DCA 2001) (Daniels) **Exhibit 27**

Comment: **This case discusses the issue of delivery** and the alternative means of establish delivery other than by actual physical delivery. Here, the deed was signed, sealed and properly executed prior to death but not delivered until after death. The lower court determined that the grantor did not effectuate a valid deed transfer by constructive delivery. The appeals court held that effective delivery did not have to be the actual physical handing over of the deed. The intention of the grantor was the determining factor, which may be manifested by acts and declarations. The court did not consider whether the doctrine of equitable conversion was applicable here. That would be another consideration in those jurisdictions where such doctrine is recognized. NB While the reasoning in this case is helpful in certifying title the examiner must exercise great caution in determining such acts or declarations other than actual delivery are clear and apparent and will withstand the text of a court proceeding. The better title practice is to obtain a Court determination before passing upon title. As an examiner, don't make the company go to the court of appeals to prove you're right.

c. *Outcast v. Wardlaw*, 750 N.E. 2d 859 (Ind. App. 2001) (Rush) **Exhibit 28**

Comment: This case considers what is a lawful claim upon title after delivery of a Warranty Deed and whether vendor is liable for expenses incurred by the vendee in defending and quieting title. This is a good case to cite to illustrate the importance of obtaining owner's title insurance coverage.

- d. *Brown v. Chapman*, 2002 WL 339388 Miss. App. (Matrick) **Exhibit 29**

Comment: Believe it or not, some people don't bother to read deeds to determine that what they intended be done was in fact done. In this case Grandma claims she relied upon grandson to prepare a deed in accordance with her instructions. The deed was prepared by an attorney. She was encourage to review the deed before signing it and admits she refused to. Later, grandma claims the property conveyed contained more land than she intended to convey. No claim of fraud was alleged. Complaint addressed issues if rectifiable mistake, relief and reformation. Denied.

DEFALCATION

- a. *American National Title & Escrow v. The Guarantee Title & Trust Co.*, 2002 Fla. App. LEXIS 1781 (Rush) **Exhibit 30**

Comment: In a case involving suspected agent wrongdoing and counterclaims of abuse of process a Florida court has determined that an title agency owner may sue her former underwriters for allegedly giving false information to authorities resulting in her arrest and jailing, and for tortuous interference with customer relations resulting in agency closure and appointment of a receiver. NB For a list of cases where agents have counter sued their underwriters for false accusation see *The Title Insurance Law Newsletter, Comment* appearing on page 2 of the October, 2001 issue.

DUTY TO DISCLOSE

- a. *Barstad v. Stewart Title 39*, P.3d 984 (Wash. 2002) (Kletke) **Exhibit 31**

Comment: The Washington Supreme Court has sided with a narrow majority of 9th Cir. state in holding that a title insurer has no duty to disclose encumbrances on title, and may not be sued for negligent misrepresentation of title. Add this case the case to the Claims Litigation Index.

EASEMENTS

- a. *Mellinger v. Ticor Title*, 113 Cal.Rptr.2d 357, 93 Cal. App. 4th 691 (2001) (Uecker, Kletke) **Exhibit 32**

Comment: In a horrendous decision a Cal. App. Ct. has determined that an insured gets a trial on its claim that it lost a buyer because title was unmarketable. Notwithstanding the fact there was no evidence in the public records of the city's claim to own the street, the court found the fact of physical encroachment by a street that the city claimed to own [note the difference] onto the insured's property establishes a triable issue of fact for a jury to decide as to whether title was rendered unmarketable. The court rejected Ticors arguments that these matters were excepted from coverage under the pre-printed

exceptions (dealing with survey and matters not shown by the public record) that appeared in the title insurance commitment and Schedule B of the Policy. NB This was a CLTA policy, not an ALTA policy.

- b. *Richman v. Gehring Ranch Corp.*, 2001 WL 1632513 (Mont. 2001) (Kletke) **Exhibit 33**

- c. *Pyramid Development, L.L.C. v. D&L Associates*, 553 S.E. 2d 725 (Va. 2001) (Davis) **Exhibit 34**

Comment: under Virginia law an easement may be terminated by cessation of purpose unless it can be clearly established that it would serve another public purpose

- d. *Nelson v. Davis*, 546 S.E. 2d 712 (Va. 2001) (Davis) **Exhibit 35**

Comment: This case discusses the difference between permissive use and adverse use. What may be implied from this case is that a trespasser who can demonstrate proven hostility will get a prescriptive right. But if hostility is absent he will not.

- e. *Carrollsborg, a Condominium Unit Owners Association, v. Eric Anderson*, 2002 D.C. App. LEXIS 30 (Davis) **Exhibit 36**

Comment: this case addresses the rule regarding the relocation of easements.

- f. *Reitsma v. Pascoag Reservoir and Dam, L.L.C.*, 774 A.2d 826 (R.I. 2001) (DeFrances) **Exhibit 37**

Comment: in this case the State of RI obtained an easement by prescription over property that was otherwise privately owned during the period of taking. Quere: Is this a taking of private rights without proper compensation?

EASEMENTS-AMBIGUITY-INTENT OF PARTIES

- *PARC Holdings, Inc. v. Killian*, 785 A2d 106 (Pa. Super. Oct 15, 2001);

Issue: Does “Ingress and Egress” include utility lines? Dominant tenement owner and developer sued servient tenement owners to obtain declaration that easement was not limited to physical ingress and egress but extended to the installation of utilities. Ambiguous language of easement allows court to determine intent of the parties.

Held: The language of the easement extended to the installation of utilities.

Comment: Parties who are drafting easement or rights of way should consider exactly what uses they intend to cover in the easement area and spell them out. While the use of the words “ingress and egress” may permit pedestrians and vehicles to come and go, it may not includes other used such as utilities.

NB Our thanks to Harris Ominsky of Blank Rome Comisky and McCauley, Philadelphia, for calling our attention to this case.

EASEMENTS-MODIFICATION-RELATION

- *MacMeekin v. Low Income Housing Institute, Inc.*, 2002 Wash. App. Lexis 612 (4/15/2002) (Hart)

Comment: Washington Appellate Court rejects Restatement, holds that easements cannot be modified or relocated without mutual consent (Dirt DD 5/3/02)

EASEMENTS-TERMINATION-ABANDONMENT

- *14TH St. Corp. v 40-56 Tenth Ave. L.L.C.*, 724 NYS2d 273 (Sup. 2001)

Comment: a conditional easement is not automatically terminated upon the mere non-use of the easement for its purpose. Rather, an intention to abandon must be evidenced by the dominant tenement owner.

- *Smigel v. Town of Rensselaerville*, 725 NYS2d 138 (A.D. 3 Dept. 2001)

Comment: Failure to maintain a public highway for the statutory adverse possession period does not necessarily result in abandonment.

NB Our thanks to Professor Patrick Randolph, UMKC, for calling these two cases to our attention in the Fall, 2001 ABA Quarterly Real Estate Report

EMINENT DOMAIN

- a. *The Southwestern Illinois Development Authority v. National City Environmental, L.L.C.*, __ Ill. __ (Ill. Sup. Ct. 2002) (Rush, Kletke) **Exhibit 38**

EQUITABLE SUBROGATION

- a. *Indymac Mortgage Holdings, Inc. v. Kauffman*, 2001 Tenn. App. LEXIS 954 (Kletke) **Exhibit 39**

Comment: The Tennessee Court of Appeals has held a negligent title search bars a claim of equitable subrogation and state a refinancing lender may not step into the shoes of the paid-off lien holder when the new lender was negligent in not finding the intervening lien. Ordinary v. culpable negligence distinguished. While the further issue of the existence of title insurance was raised on appeal, the Court did not rule that Indymac was barred from claiming first lien position because it had title insurance. Thus, Tennessee has not (yet) fallen into bed with the Washington S.Ct in *Kim v. Lee* or the Indiana App. Ct. in *Whilshire Servicing Corp. v. Timber Ridge Partnership*, denying equitable subrogation where the claimant is covered by title insurance. See also DD if April 11th, 2001 citing *King v. Towe* (Okla. Civ. App. 1999) for similar results. In the larger perspective however it joins these decisions and that of *Leppo, Inc. v. Keifer*, (Ohio App.) [Title Counsel Agenda Spring 2001 item 15, Exh 30] in finding the doctrine inapplicable when the title insurer made an error.

- b. *Centreville Car Care, Inc. v. North American Mortgage Co.*, __ S.E.2d __ (Va. March 1, 2002) (Davis) **Exhibit 40**

Comment: Virginia reconsiders equitable subrogation where title insurance is present, following precedent established in Indiana and Washington. The Virginia Supreme Court denied equitable subrogation due to search negligence and says the equities are with the intervening lien holder when a new lender's title searcher missed the prior lien and the property has been sold. NB Since the court also held that the negligent title search conducted by "its agent" (the title company) was imputed to the lender we suggest litigation counsel begin to cross reference these cases with "abstractor liability" and "search error" cases.

Observation: In a recent spat of cases denying equitable subrogation we sense a lack of understanding on the various courts part of the relationship of a title insurer and its insured lenders and who, under the doctrine, is entitled to received the benefits of equitable subrogation.

Practice Suggestion: NB We suggest that litigation counsel enter these cases in the master claims litigation index including those cases listed in September 1999, May, September, and October, 2000 and the March and July 2001 issues of *The Title Insurance Law Newsletter*. We also suggest a review of the Dirt DD of April 4th, 2001 and Bush Nielsen's reply post of April 3rd listing other equitable subrogation cases.

ESCROW

- a. *Premier Title Co. v. Donahue*, 2002 WL 342749 (Ill. 2002) (Kletke) **Exhibit 41**

Comment: This case involves an appeal from summary judgment in favor of title insurer. An Ill. App. Ct. has ruled that where a seller signed both an escrow and indemnity agreement and "forever" indemnified the title company against unpaid taxes he remained obligated for such taxes even though the title company mistakenly returned a portion of the balance to him without paying the taxes. The court determined that the term "forever", as used in the indemnity agreement, meant the defendant was under a continuing obligation notwithstanding the fact that it appeared to conflict with the 30 day limitation period set forth in the escrow agreement. NB *This case illustrates the fact that Title Indemnities and Escrow Agreements are not the same thing and should be drawn in such a manner so as the escrow language about the collateral is not contradictory or ambiguous with the indemnity provisions.*

- b. *Bishop v. Jefferson Title Co.*, 28 P.3d 802 (Wash. 2001) (Rush) **Exhibit 42**

Comment: Escrow agent and its non-attorney escrow officer may be liable for negligence in document preparation and for failing to advise clients about the limits of escrow officers authority in preparing legal documents. Agent is not authorized to carry out closing and prepare documents for closing where preparation includes anything other than "fill-in-the-blank forms". When agent inserts language into deeds that amounts to an assumption of a wraparound mortgage obligation, inconsistent with the probable intent of at least one of the parties, Consumer Protection Act is violated.

- c. *Harrington v. MacNab*, 163 F. Supp. 2d 583 (Md. 2001) (Rush) **Exhibit 43**

Comment: Personal check presented at closing and availability of funds verified. Check bounced. Claim against bank for negligent misrepresentation dismissed.

Bank owes no duty to unrelated third party. Issue of detrimental reliance not presented for consideration by court.

- d. *Lakeside Oakland Development, L.C. v. H&J Beef Co.*, 2002 Mich. App. LEXIS 105 (Rush) **Exhibit 44**

Comment: Conveyance must be in writing signed by the grantor [statute of frauds]. In this case a description of a proposed easement was attached to the deed as an exhibit but there was no evidence of intent by the grantor to convey the easement area. NB This is a good illustration why as a matter of practice all the pages of the deed should be initialed by the grantor.

- e. *Summit Financial v. Continental Lawyers*, 2002 WL 356272 (Calif. Supr. Ct. 2002) (Kletke, Cavallaro, Rush) **Exhibit 45**

Comment: This case was addressed earlier in Spring 2001 ALTA Title Counsel Meeting Agenda Item 16, Exh. 34. At that time you may recall the Court of Appeals reversed *Kirby*, Id. On Appeal the Supreme Court ruled that the escrow holder did not owe either a fiduciary or a tort of care to a non-party to the escrow based on assignment to that non-party by another non-party to the escrow. Court of Appeal judgment affirmed.

- f. *Mark Properties v. National Title Co.*, 34 P3d 587 (Nev. Sup. Ct. 2001) (Rush, Davis) **Exhibit 46**

Comment: This case was addressed earlier in the Spring ALTA Title Counsel Meeting Agenda item 16, Exh. 33 and ABA Real Estate Quarterly Report, Fall, 2000. At that time the Nevada Supreme Court had held that an escrow agent *has duty to disclose* ‘Known fraud’ to parties to escrow. The case arose out of fraud practiced in a series of “flip” transactions. On rehearing the Nevada Supreme Court has withdrawn and replaced its earlier opinion. The Nevada Court again sided with the Arizona Court rather than the California Court [case below] but trimmed its prior loose language. The court now suggests that while the escrow agent has no duty to investigate circumstances surrounding a particular sale or to disclose “suspicious circumstance” it does have a duty to disclose “known [read actual] fraud”.

FEDERAL TAX LIEN

- a. *US v. Craft*, U.S. Sup. Ct. No. 00-1831 (April 17, 2002) (w/USCA 6th Cir opinion) (Jones, Davis) **Exhibit 47**

Comment: In a blockbuster case overturning prior law and established title practice the U.S. Supreme Court has ruled 6-3, that an IRS lien recorded against one spouse attaches to all property interests in property held as tenants-by-the-entirety. In doing so it ignored an IRS Chief Counsel Advisory that a federal tax lien does not attach to real property held as tenants-by-the-entirety. The decision essentially changes the nature of legal interests tenants-by-the-entirety have in

property. In the instant case a notice of federal tax lien was filed against the husband alone. Subsequently, (and this is a key consideration) H&W transferred title to W alone. W then proceeded to convey the property. The IRS took the position that it would release the lien and allow sale on the condition that one-half of the net proceeds be held in escrow. Whether the IRS has the right to partition or foreclosure upon such property is not at all yet clear and remains to be seen. The court did not deal with the rights of the IRS if the title had remained with the married couple. Nonetheless, most underwriters will err on the side of caution and require a federal lien indexed against either party be released before closing.

- b. *Melling v. Mattley* 10 Neb. App. 745 (2002) (Kletke) **Exhibit 48**

Comment: This case discusses the various problems that may be encountered when one is asked to insure title coming through a federal tax distraint sale, including proper notice, service of process [U-207] and the need to quiet title.

FRAUDULENT TRANSFERS

- a. *Mejia v. Reed*, Santa Clara Co. Super.Ct.No. CV 769375 (March 29, 2002) (Cavallaro) **Exhibit 49**

Comment: Divorcing couple's property division under a marital settlement agreement incident to a marital dissolution may constitute a fraudulent transfer and is subject to claims of creditor's under fraudulent transfer law and the UFTA, particularly where husband abandons his medical practice and retains not assets. Compare to Exh. 19.

HOMESTEAD

- a. *McMillan v. Aru*, 773 So2d 355 (Miss. 2000) (Matrick) **Exhibit 50**

Comment: Under Mississippi law homestead property is exempt from judgment execution so long as parties are in possession and there is no evidence of abandonment. In this case judgment creditor of vendor attempted to execute on homestead property following sale to bfp but before deed was recorded. Held: Judgment lien that predated debtor's sale of homestead did not become effective for failure of vendor-debtor to stay in residence until after deed was recorded.

INHERITANCE RIGHTS

- a. *Woodward v. Commissioner of Social Security*, 2002 WL 4289 (Mass.) (Uecker) **Exhibit 51**

Comment: this case discusses inheritance rights involved when artificial insemination is present.

MECHANICS LIENS

- a. *Betancourt v. Sorke Housing Investors*, Super. Ct. No. 1003927 (Santa Barbara, Calif. 2001) (Cavallaro) **Exhibit 52**

MORTGAGES

- a. *Kalange v. Rencher*, 30 P.3d 970 (Idaho 2001) (Rush) **Exhibit 53**

Comment: There is no necessity to go beyond the record title to determine if there are any off-record side agreements. Lender has priority over prior unrecorded note, security and performance agreements.

- b. *Thomison v. Long Beach Mortgage Co.*, 2001 U.S. Dist. LEXIS 22141 (Tex.) (Kletke) **Exhibit 54**

Comment: Texas Constitution places certain restrictions on transactions involving homestead property. Texas home equity loans are discussed in Stringer v. Cendant Mortgage Corp., discussed at the ALTA Title Counsel, Fall, 2000, item 40, Exh. 62. Second mortgage that required owner to pay fees to originate, evaluate, maintain, record, insure or service the extension of credit that exceed, in the aggregate, 3% rendered void under Texas Constitution. *See also Doody v Ameriquest Mortgage Co.*, 49 SW3d 342, 344 (Tex 2001)

MORTGAGES-FORECLOSURE-LIENS-TAX LIENS

- c. *S&R Associates v. Lynn Realty Corporation*, 338 N.J. Super 350, 769 A2d 413
(App.Div.2001)

Comment: When a mortgage is sold by the FDIC, the underlying security remains burdened by pre-existing tax liens, even though they could not have been foreclosed without the FDIC's consent during FDIC ownership. See DIRT DD of 1/4/02

- MORTGAGES-CONSTRUCTIVE NOTICE-RECORDING ACTS-IDEM SONANS-THE VALUE OF INSURANCE

- d. *Coco v. Ranalletta*, 733 NY2d 849 (2001) [see Item 68]

Comment: A New York trial court has held that a recorded mortgage bearing a misspelling of the owners/mortgagor's name **doe not** impart constructive notice, and thus is not entitled to priority over later recorded mortgage. Even though the earlier mortgage can be found using the recorder's computerized indexing system and common searching techniques.

NOTICE

- a. *Dusenberry v. US*, ___ U.S. ___ 2002 (U.S. Supr. Ct. No. 00-6567, Jan. 8, 2002) (Cavallaro) **Exhibit 55**

Comment: This is a forfeiture case that discusses the question of incarceration and sufficiency of service of process via prison procedure of delivering certified mail to prisoner. Mennonite says State *must attempt to provide actual notice*, not that it *must provide* actual notice. FBI's notice of cash forfeiture satisfied due process.

POLICY COVERAGE

- a. *Hess v. Baccarat*, 731 N.Y.S.2d 296 (2001) (Kletke) **Exhibit 56**

Comment: This case discusses the concept of a "New York Style" closing where a title closer "marks-up" the title commitment. In this case there was a conflict of mark-ups. The title commitment when issued took exception to an easement. The closer removed the exception from one version of the marked-up commitment delivered at closing but not the other version signed by the insured notwithstanding the fact that the survey reading disclosed that the premises were subject to the easement. The policy, when issued, took exception to the easement. Thereafter a dispute arose and ATIC refused to defend on the grounds that the easement was excepted from coverage. The trial court granted summary judgment to ATIC on the grounds that any claim of negligence in the marking up of the commitment merged into the final policy. Judgment affirmed.

- b. *Boel v. Stewart Title Guaranty Co.*, 2002 WL 276776 (Idaho) (Kletke) **Exhibit 57**

Comment: This case illustrates the danger of the use of an overly broad general exception intended to except for any class of problems. In this case the title insurer took exception for an underground ditch. However, it failed to note that title to land in which the ditch was located was not an easement but rather fee title vested in a third party whose interest was not accounted for. Title to that portion of the property was vested in the U.S. government. This resulted in a clear violation of Policy Insuring Clause 1, "Title vested than as otherwise stated in the policy"

- c. *Dawson v. Chicago Title*, 2002 WL 80162 (Texas) (Kletke) **Exhibit 58**

Comment: This case involves the assessment of Roll back taxes. In this case vendor executed a warranty deed, signed an affidavit of title declaring there were no tax liens on the property and signed a tax proration agreement where he [promised to pay all delinquent taxes. Taxing authority thereafter made claim and vendees title insurer paid the taxes, thereafter exercising their contractual right of subrogation under the policy and sued vendors under his covenants against encumbrances. Vendor claimed taxes were a post policy event voluntarily paid by title insurer. Court held there was not volunteer defense to subrogation. A title insurer does not have to prove that its loss was covered by the policy in order to recover against the seller on his deed covenants of warranty.

- d. *Vorgitch v. Fidelity National*, 2002 WL 86870 (Cal. App 2 Dist.) (Kletke) **Exhibit 59**

Comment: A California Appellate Court has held that a title insurer is not required to state in an exception for an access easement that the easement was exclusive. This case may be of assistance in resolving claims of abstractor negligence within the context of a policy of title insurance since the court has held that the policy in its entirety insurance and not an abstract of title. If there is no defect in the insured title then there is no obligation to defend. NB this was not the same court that reviewed Mellinger, supra., Exh 32.

POWER OF ATTORNEY

- a. *Treglia v. Zanesky*, 67 Conn. App. 447 (2001) (DeFrances) **Exhibit 60**

Comment: This case discussed whether the statutory directive for use of a power of attorney may be waived where there is another form of grant of authority such as an affidavit of authority or oral POA. Connecticut Appellate Court in case of first impression holds same may be voidable but it is not void since Conn. cases in the past have held that a conveyance of property rights is not automatically nullified by lack of adherence to certain formalities. We don't recommend this practice however as it goes to the issue of marketability under the policy.

PREEMPTION

- a. *Association of Banks in Insurance v. Duryee*, 270 F3d 397 (USDC Ohio 2001) (Kletke) **Exhibit 61**

Comment: Interprets the Barnett Bank case in light of the later Financial Reform Act of 1994 as thereafter supplemented by GLB which creates separate preemption standards. This case stands for the proposition that Federal law preempts any legal scheme that prohibits or prevents banks from engaging in the insurance business.

PREDATORY LENDING

- b. *Black v. Financial Freedom Senior Funding Corp.*, 92 Cal. App. 4th 917 (2001) (Uecker) **Exhibit 62**

Comment: this case examines the predatory lending issues involved in *reverse annuity mortgages*.

- PROCESS-SERVICE-NOTICE [U-207]

First Resolution v. Seker, N.J. S.Ct. [(A-116-00, decision posted 5/8/02) go to <http://lawlibrary.rutgers.edu/courts/supreme/a-116-00.opn.html>]

Issue: Whether ordinary mail constitutes valid service when the certified mail is returned marked "unclaimed".

Comment: This case was originally brought within the context of a wage garnishment. The New Jersey Supreme Court unanimously held that plaintiff's proof of service was adequate under the New Jersey Rules of Court.

NB By dirt post of 5/8/02 Professor Frank B. Arenas advised the listserv. that the 9th Cir. ruled on 3/20/02 that service **by email** was adequate to find a defendant

in a default judgment. We suspect that these cases will not fly when an attempt is made to apply them to divestiture of real property interests in foreclosure cases by reason of the prior Mullane and Mennonite decisions. Then again, who anticipated Craft?

RESPA

- a. *Patton v. Triad Guaranty Insurance*, 277 F.3d 1294 (11th Cir. 2002) (Uecker, Kletke) **Exhibit 63**

Comments: This case discusses the role of mortgage insurance as an implicit part of underwriting and funding of loans. The 11th Circuit has now held that mortgage insurers are regulated by RESPA. Prior to 1992 it was believed the RESPA anti-kickback provision was preempted by McCarran-Ferguson Act, which gave the states exclusive rights to regulate insurer. In 1992 the definition of settlement services was restated to include title insurance, mortgage originators and lenders. However, there was not specific reference to mortgage insurance. This case holds that RESPA was intended to include mortgage insurance as a settlement service and thus the RESPA anti-kickback provisions of RESPA are not preempted by McCarran-Ferguson.

- b. Discussion of Briefs and Oral Arguments USCA for 4th Cir. in *Crossland Mortgage v. Boulware* (Maher) **Exhibit 64**

RICO

- a. *Smith v. Berg*, 2001 U.S. Dist. LEXIS 15814 (Penn.) (Kletke) **Exhibit 65**

Comment: On its face this case is significant because it establishes what is necessary to certify a class. However, this case has other, less considered significance and that is that fact that under the original case a title insurer was not allowed removal by summary judgment when sued under RICO, even though the plaintiffs did not allege any “predicate acts of racketeering” against the insurer. Following the ruling of the U.S. Supreme court in *Beck v. Prupis*, 120 S. CT 1608 (2000), the Pa. court found that it was enough that the insurer was alleged to be a conspirator with a person who, in turn, was claimed to have been a racketeer. The greater concern might be as follows. Supposing in some future case similar allegations were made as were made in this case, together with allegations similar to those advanced in *U.S. v Kesky*, and it was determined by the court that the title underwriter actively participated in the conspiracy or knew of and/or tacitly approved of the fraudulent and deceptive practices.

RIGHT OF FIRST REFUSAL

- a. *Firebaugh v. Whitehead*, ___ S.E.2d ___ (Va. March 1, 2002) (Davis) **Exhibit 66**

RIPARIAN RIGHTS

- a. *ABKA Limited Partnership v. Wisconsin Department of Natural Resources*, 247

Comment: This case involved the proposed dredging of a public marina with private lease boat slips. The fee owner sought to convert all the boat slips to a condominium style ownership called a “dockominium”. The Dept. of Natural Resources [DNR] determined the change of ownership required new permits be obtained. The owner challenged that decision. Thereafter the Adm. Law Judge [ALJ] determined the marina could only convert a limited amount of the boat slips to a dockominium under the DNR permit. The Circuit court affirmed the ALJ decision on the theory that the rights of riparian owners are subject to both the “public trust doctrine” and the reasonable use of private owners. The Court of appeals held the dockominium proposal violated the public trust doctrine and the state, through the DNR may not abrogate its obligation to enforce riparian rights under the public trust doctrine. Conversion denied. NB For another recent ruling on Dockominiums see *R.W. Docks and Slips. V. CTIC*, 2001 WL 856431 (Minn, App.) where the court determined a title insurance policy covering dockominium slip units excludes coverage for the state’s claim of public trust ownership of the lake bed.

SEARCH ERROR

- a. *Coco v. Ranalletta*, 733 N.Y.S.2d 849 (2001) (Kletke) **Exhibit 68**

Comment: *see comment* under Mortgages-Constructive Notice, preceding item 55.

SURVEYOR LIABILITY

- a. *Commonwealth Land Title v. Hart*, 2002 WL 171280 (Wash.App. Div. 1) (Kletke) **Exhibit 69**

Comment: A Washing surveyor who ignored existing survey and natural monuments, and measure from the wrong line, did not perform his duties in accordance with the standard of care established by his profession and insurer may recover from surveyors negligence.

TAX SALE REDEMPTION

- a. *Perret v. Loflin*, 2002 WL 244837 (Miss) (Matrick) **Exhibit 70**

- TITLE SEARCH-CLOSINGS-MALPRACTICE

In Schlindrer v. Manson, 2001 Conn. Super. Lexis 3379 (ii/29/01)

Comment: Attorney for purchasers of residential property is not guilty of professional malpractice for failing to review the zoning records to determine whether there was a use limitation in effect with respect to the property, or for failing to advise the purchasers that the title search he conducted did not address zoning issues. NB Pro: *Aldrich v. Hawrylo*, 656 A2d 1304 (N.J. Super. 1995) holding setback restriction imposed by zoning variance approval fell within police power exclusion clause of policy. Contra: *Sunderlin v. National Attorneys Ins.*

Co., 213 NYLJ 25 (1995) which also raised the marketability issue much the same as Mellinger, supra. Exh. 32.

LEGISLATION AND REGULATION

40. *D.C. Predatory Lending Act Repealed* (Davis) **Exhibit 71**
41. *Debt Restructuring Problems in the Workout of Troubled Real Estate Assets—Part II*, W.C. Hart (Hart) **Exhibit 72**

Comment: A copy of this paper may be found on the TLA Web site located at www.titlelawannotated.com. Go to the left column and click on Debt Restructuring.

42. *US Patriots Act: a Discussion of Company Regulatory Compliance Plans* (Hutchinson, Maher)

Comment: see Dirt Posts of 1/26-1/28, 2002 on dirt archives. *See also* K&L Alert *Mortgage Banking / Anti-money Laundering*, Kirkpatrick & Lockhart LLP, April 2002.

OLD BUSINESS

NEW BUSINESS

ADJOURN