Title Management Today

The Independent News Magazine for Title Company Officers, Managers and Counsel

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1. The ALTA has begun to publish a weekly news e-mail called This Week on ALTA.ORG . It covers current developments within the title industry including governmental legislation and a Media watch focusing on published articles of interest to the title and mortgage industry. The service is free to all ALTA members. This service will no doubt impact upon the Current Developments section of future TMT issues and reduce both the length and detail of that section.

2. Spring 2005 ALTA Title Counsel Case Law Agenda. Review and Commentary beginning on page 2.

*EDITOR'S DESK *

On November 9. 2005 HUD submitted a proposal to launch an interactive website to collect complaints from consumers and settlement service providers regarding potential violations of the RESPA. According to HUD's proposal, consumers will be able to use the website to learn more about settlement costs and to ensure that they are not being charged unreasonably high costs. Significantly, consumers and competing settlement service providers will be able to use the website to make complaints against settlement service providers by completing and filling out a complaint questionnaire furnished on the site. HUD plans to use the questionnaires to collect information and investigate potential violations. HUD is accepting comments from affected agencies and members of the public. The comments must be submitted no later than January 9, 2006. They should be addressed to Wayne Eddins, Reports Management Officer, Department of HUD, 451 7th Street, L'Enfant Plaza Bldg., Room 8003, Washington, D.C. 20410 or via email to Wayne_Eddins@hud.gov. All comments must reference the "Notice of Proposed Information Collection: Comment Request; RESPA Web Site Complaint Questionnaire" – OMB Control Number 2502. To view the actual notice go to www.hudclips.org .

In the event you should have any questions please contact us at our Editorial Office at 215.379.3195 or contact the ALTA at www.alta.org . Click on Government News for the week of Nov. 4, - Nov. 11, 2005. Thanks to Francis X. Riley III and Honora S. Moore of the Saul Ewing Real Estate Practice Group for calling this to our attention

Discussion of Cases in Order of Presentation. NB The numbers below refer to the case exhibits noted in the summer issue.

Adverse possession.

3. In re Seifert, 128 Cal. App. 4th 64 (Ct. App. 2005).

Prior to 1994, a father owned 20 acres of land. He made an oral, inter vivos gift of the land to his son, Bob, but the father's last will and testament left the property to others. The father died in 1998, just short of the statutory five year period for adverse possession in California. Bob, as executor of the estate, distributed the father's assets, but not the property. A beneficiary of the will, Bob's brother, then sued Bob to enforce a bequest of the property. Bob defended on the ground that he had acquired the property by adverse possession, but the Court held that the period of Bob's possession while Bob was serving as executor could not be counted. Therefore, the brother prevailed.

4. Sleeping Indian Ranch, Inc. v. West Ridge Group, LLC, 107 P.3d 1028 (Colo. Ct. App. 2004).

A vendee's use of land cannot support an adverse possession claim against his vendor under a land sale contract.. The vendee's possession would not be hostile unless the vendee repudiated his contract with the vendor.

5. McIntyre v. Board of Commissioners, Gunniston County, 86 P.3d 402 (Colo. 2005).

Occasional use of a trail by members of the public would not support an easement by prescription in favor of the County for lack of a claim of right on the part of the County. The County had not maintained the trail, nor had the County shown the trail on the County's highway map.

Arbitration

6. Bird Peak Corporation v. Lawyers Title Insurance Corporation, No. 03-9255, 2004 U.S. App. LEXIS 16237 (2d. Cir. Aug. 6, 2004) (unpublished).

Insured opposed arbitration demand on the ground that insured had not been notified of the arbitration clause. Insured's acceptance of the policy, and ownership for many years, constituted acceptance of arbitration clause. Therefore, the title insurer was entitled to demand arbitration. 10:06).

7. King v. Davis, 601 S.E.2d 326 (N.C. Ct. App. 2004)Insured ordered policy from Chicago Title after closing on the subject property. The policy's arbitration clause was held to be unenforceable because the plaintiffs did not sign the policy and had not been informed that the policy would contain an arbitration clause

Attorney Fees

8. Paul v. Schoellkopf, 128 Cal. App. 4th 147 (Ct. App. 2005).

Various disputes arose between parties to a real estate transactions. The court held that an attorneys fee provision in the escrow instructions limited to the fees incurred by the escrow agent in collecting for escrow services was inapplicable to the disputes between the buyer and the seller. (Monday 10:08 - 10:10).

Bad Faith

9. Stewart Title v. Stag Gulch Partners, No. 02CA1464 (Colo. Ct. App. 2003) (unpublished).

Providing the insured with a defense did not estop Stewart from asserting a policy defense based on the exclusion for adverse claims known to the insured, not of record, and not disclosed to the title insurer. In this case, the insured knew about a neighbor's adverse possession claim, but did not inform Stewart. Stewart's deletion of a regional exception for unrecorded easements did not impair the effectiveness of the exclusion. Although Colorado recognizes a tort duty on the part of an insurance company to act in good faith, Stewart did not breach that duty in denying coverage based on the exclusion.

Bankruptcy

10. In re Schmiel, 319 B.R. 520 (Bankr. E.D. Mich. 2005).

A refinance deed was delivered to the Register of Deeds within 10 days of the closing, but the Register of Deeds did not actually record the mortgage for two months. The borrowers filed a bankruptcy petition within 90 days of the recordation of the mortgage, which resulted in a suit by the bankruptcy trustee to set aside the mortgage as a preference. The bankruptcy court agreed with the trustee, based on a Bankruptcy Code provision holding that a transfer occurs when the transferee's interest is perfected, unless the perfection take place with 10 days of the date of the instrument.

NB Burt Rush noted that another judge of the same court issued a contrary opinion.

Bankruptcy; Leases; Free and Clear Sale: Bankruptcy court holds that a 363 "free and Clear sale" of bankrupt landlords assets connot terminate tenant's 364 rights where tenant objects. Qualitech limited and distinguished.

11. In re Haskell, L.P., 321 B.R. 1 (Bankr. D. Mass. 2005).

The debtor, a landlord, moved to sell its property free and clear of a lease to New England Baptist Hospital. The debtor relied on Precision Industries v. Qualitech Steel (7th Cir. 2003), which held that Section 365 of the Bankruptcy Code did not preclude sale of property free and clear of lease pursuant to Section 363, if the requirements of Section 363 are satisfied. The court in Haskell held that the requirements of Section 363 were not satisfied in Haskell because the tenant could not be required to accept a monetary satisfaction for the lease. The debtor's rejection of the lease did not have the effect of terminating it because Section 365 allows a tenant to remain in possession of leased property even if the landlord becomes a debtor under the Bankruptcy Code and thereafter rejects the lease. For a more detailed analysis please refer to ABA Real Estate Quarterly Spring, 2005 page 9.

Bankruptcy; Chapter 11; Transfer Taxes; Sale Prior to Plan Confirmation

12. In re Beulah Church of God, 316 B.R. 41 (Bankr. S.D.N.Y. 2004).

A sale of real estate assets from a bankrupts estate prior to the plans confirmation qualifies for the exemption from transfer taxes under 1146 (c) of the Code where the sale is an integral part of the reorganization plan that is subsequently confirmed. The court held that the exemption from recording taxes for deeds recorded pursuant to a confirmed Chapter 11 plan would apply even though the property in question was transferred prior to confirmation of the debtor's Chapter 11 plan. Such a plan was pending at the time of the transfer, but the plan had not been confirmed. Held: the exemption applies provisionally because the plan could not succeed without the sale of the property; however, the exemption would be inapplicable if no plan was confirmed. For a more detailed analysis please refer to ABA Real Estate Quarterly Fall, 2005 page 6.

13. In re Chase, Case No. 02-10582, Adversary No. 03-1058 (Bankr. D. Vt., Jan. 27, 2005 (unpublished).

A strict foreclosure under Vermont law is not entitled to a presumption that the sales price was for reasonably

equivalent value. Therefore, the foreclosure may be avoided if the person challenging it proves the elements of a fraudulent transfer under Section 548 of the Bankruptcy Code. Those elements include proof that the foreclosure sale was for less than reasonably equivalent value.

14. In re Prakope, 317 B.R. 593 (Bankr. E.D.N.Y. 2004).

Theodore Prakope filed voluntary bankruptcy in 2004. This was his third bankruptcy in three years. He and his wife owned a house as tenants by the entirety subject to a $900,000 first mortgage, a $500,000 SBA second mortgage, and judgment liens of $300,000. Prior to the bankruptcy the Prakopes contracted to sell the house of $970,000, which compared to an appraised value of $1.2 - $1.4 million. Thinking that there might be some equity for unsecured creditors, the bankruptcy trustee rejected the contract. Contract purchasers moved to intervene, and they wished to sue Mrs. Prakope for breach of contract. However, the contract provided that purchaser's only remedy for non-curable title defect would be to cancel the contract. Held: the trustee's rejection of the contract terminated the contract, and the contract purchaser's motion to intervene was denied.

15. In re Lewis, 398 F.3d 736 (6th Cir. 2005).

The trustee sued to set aside as a preferential transfer a mortgage that was recorded six months after its execution but less than 90 days prior to the borrower's bankruptcy petition. The bank, which was in receivership, asserted an equitable subrogation claim and contested the bankruptcy court's decision to decide that claim. Because the bank was in receivership, it asserted that the equitable subrogation should be determined by its receiver, FDIC. This argument was based on the Financial Institution Reform, Recovery and Enforcement Act ("FIRREA"). The Sixth Circuit disagreed, and upheld the bankruptcy court's jurisdiction to decide the question of lien priority.

CLOSING PROTECTION LETTERS

16. ABN AMRO Mortgage Group, Inc. v. Promised Land Mortgage, LLC , 2005 U. S. Dist. LEXIS 5160 (S.D. Ind.).

This is the first case that may hold, at least preliminarily, that a closing protection letter creates legal duties in favor of an assignee of a mortgage loan. After purchasing 109 mortgage from Promised Land Mortgage, ABN AMRO sued

Promised Land and others alleging that the loans had been induced by fraud and that the collateral for all of the loans was worth only $1,000,000, compared to an aggregate loan amount of $6,000,000. Among the defendants were two title insurance agents, First American Title Insurance Company and Fidelity National Title Insurance Company.

ABN alleged that the settlement agents knew about the loan fraud and that the settlement agents had prepared HUD-1s that falsely stated that the borrowers had made cash down payments at the closing. ABN charged that the settlement agents were liable for ABN's losses under theories of negligence, breach of fiduciary duty, negligent misrepresentation, constructive fraud, fraud and dishonesty. ABN alleged that First American and Fidelity were liable for the settlement agent's misconduct pursuant to master closing protection letters. The Court denied motions to dismiss filed by the title insurer and closing agents, noting that master closing protection letters issued to ABN corroborated the lender's claim that the settlement agents had at least some kind of fiduciary duty to ABN. The Court observed that the defendants assertions would be more fruitfully advanced in a motion for summary judgment after a factual record has been developed.

CONVEYANCES

17. In re Marriage of Dauwe, 97 P.3d 369 (Colo. Ct. App. 2004).

In the Dauwes' divorce case, the trial court awarded the marital home to the wife, but made no provision for releasing the husband's liability on the mortgage. In a subsequent proceeding the ex-wife asked the trial court to order the Clerk to execute an instrument on behalf of the husband, and such an order was issued. The Court of Appeals reversed because the lower court's authority to have deeds executed in the name of a party is limited to cases in which the court had ordered the party to sign a deed, and the party has failed to comply. Here, the underlying order did not require any action on the exhusband's part in regard to the mortgage.

COVENANTS

18. Tippecanoe Associates, II, LLC v. Kimco Lafayette 671, Inc., 811 N.E.2d 438 (Ind. Ct. App. 2004).

The Indiana Court of Appeals upheld a non-compete clause whereby the owner of a shopping center covenanted with

one of the tenants, a grocery store operator, not to lease any part of the shopping center to another grocery store. The store owner argued that the covenant should be declared void because of changed circumstance, but the principal changes were that the surrounding neighborhood had changed, the center had lost its anchor tenant, and another grocery store owner was the only prospective tenant interested in the vacant space. The court of appeals held that these changes were not a sufficient basis for cancelling the existing tenant's bargained for rights under the restrictive covenant.

COVENANT NOT TO COMPETE

19. Chicago Title v. Magnuson, No. C2-03-368 (S.D. Ohio, Feb. 9, 2005).

Chicago Title recovered judgment for actual and punitive damages against Magnuson and First American for breach of non-competition covenant in Magnuson's employment contract with Chicago Title and for tortious interference with that employment contract. Chicago Title's evidence included an indemnity agreement from First American covering Magnuson's liability if sued by Chicago Title. Chicago Title prevailed on the appeal. Chicago Title v. Magnuson, 2005 WL 2373430 (S.D. Ohio 2005). There was a similar case in New Jersey in the early 1980's where CLTIC sued LTIC for a similar raid upon a competitors employees.

DEEDS

20. Blancett v. Blancett, 102 P.3d 640 (N.M. 2004).

The elements of a valid deed under New Mexico law include (1) execution, (2) delivery, and (3) the intention to make a grant. In this case the third element was missing. The execution and delivery of unambiguous deed is not conclusive of a grant. Instead, execution and delivery of a deed create a presumption of a grant, but the presumption may be rebutted by extrinsic evidence. In this case, the court found a father's execution and delivery of two deeds to his son's wife was intended as a temporary estate planning device, and were delivered subject to an oral condition that they were not to be recorded unless the father died or went crazy. Therefore, the father could cancel the deeds.

DUTY OF CARE

21. Hoida, Inc. v. M&I Midstate Bank, 688 N.W.2d 691 (Wis. Ct. App. 2004).

An unpaid subcontractor sued a construction lender and a title insurance agency for making construction loan disbursements without obtaining lien waivers from subcontractors. Although the court found that the escrow agent owed a duty to the subcontractors, the suit failed because the lender's mortgage had statutory priority over the subcontractor's right to a mechanics lien. Because Wisconsin's statutory scheme prefers construction lenders over mechanics lien claimants, public policy barred a tort remedy that would otherwise have been available to the subcontractor.

EASEMENTS

22. Zhang v. Omnipoint Communications Enterprises, Inc., 866 A.2d 588 (Conn. Sup. Ct 2005) (2005 Conn. LEXIS 22 (Feb. 1, 2005).

A 1923 easement for "telephone purposes" was construed as broad enough to encompass a wireless telecommunications tower. However, the Supreme Court remanded the case for trial on whether the power company that owned the easement could grant a partial assignment of the easement to a telecommunications company and on whether use of the easement by the telecommunications company overburdened the easement. For a more detailed analysis see LandSakes Post of May 18, 2005 and Commentary by Bert Rush.

EASEMENTS; IMPLICATION: An easement recorded in favor of oneself is void as an express easement and Florida law will not recognize an implied easement arising from preexisting use unless there has been a prior grant of an easement in a duly executed valid document that is too ambiguous to create an express easement.

23. One Harbor Financial, Ltd. v. Hynes Prop., 884 So. 2d 1039 (Fla. Dist. Ct. App. 2004).

A purported easement failed because one cannot grant oneself an easement to use one's own property. In this case, Hoffenberg took title to two adjoining properties "individually and as Trustee." However, the deeds did not identify either the trust agreement or the beneficiary of the trust, so the deeds were deemed to convey the property to Hoffenberg as an individual. Fl. Statute 689.07. Hoffenberg built a 75,000 square foot building on one of the properties and purported to grant himself a parking easement over the adjoining property. A subsequent purchaser of the adjoining property asserted that the purported easement failed because Hoffenberg could not grant an easement to himself. The Court of Appeals agreed. For further analysis by professor Randolph see DIRT Post for March 23, 2005 and ABA Real Estate Quarterly Report for Spring 2005 at page 27.

24. Von Klompenburg v. Burghold, No. C045417 (Cal. Ct. App. Jan. 31, 2005).

A grantor conveyed part of his property, but reserved a road easement for the benefit of the residue. The easement provided that road would be unobstructed. Purchasers of the burdened property put gate across road to prevent trespassing, dumping and burglary, and offered the owner of the dominant estate a key to the gate. However, the owner of the dominant estate insisted that the gate be removed. The Court held that the easement allowing unobstructed access precluded the owner of the servient estate from maintaining a gate.

25. Lee County Board of Supervisors v. Scott, 2005 WL 225329 (Miss. Ct. App.).

For a private road to become a public road by prescription, it must be habitually used by the public for a period of ten years, and the use must be under claim of right. In this case, the Board of Supervisors claimed that it had maintained the road for ten years, but nothing in the Board's records supported this contention, and various County maps depicted the road as a private road rather than as a public road. Hence, the evidence was insufficient to support the Board of Supervisors' determination that the road had become a public road by prescription.

26. American Quick Sign, Inc. v. Reinhardt, 2005 WL 782687 (Fl. Dist. Ct. App. April 8, 2005).

Owner of a service station places a sign within the area of an easement that provided access to a public road via another parcel of land. The owner of the servient parcel objected, so the parties went to court to determine whether the purpose of the easement included signage. The easement had no stated purpose. However, the Court of Appeals held that the lack of a stated purpose did not render the easement void, but merely created an ambiguity. The Court of Appeals determined that the easement's purpose was only for ingress and egress based on the fact that the easement replaced a prior temporary easement that ripened into a permanent easement when the owner of a leasehold estate exercised an option to purchase. Because the temporary easement had ingress and egress as its only purpose, the Court inferred that the permanent easement was limited to the same purpose. Therefore, the owner of the dominant parcel was not permitted to maintain a sign within the easement area.

Easements; Necessity; Termination; Marketable Title Acts: Florida S. Ct. departs from prior finding and rules thatfailure to record interest under Marketable Record Title Act does not invalidate claims for a statutory way of necessity, although it may continue to affect common law ways of necessity

27. Blanton v. City of Penellas Park, 887 So. 2d 1224 (Fla. 2004).

Florida's Marketable Title Act precludes a common law way of necessity that is not asserted within the time required by the Act, but does not preclude a statutory way of necessity. A statutory way of necessity is available when landlocked property is used for residential or agricultural purposes, and the Marketable Title Act is inapplicable to a statutory way of necessity.

28. City of Orlando v. MSD-Mattie, L.L.C., 895 So. 2d 1127 (Fla. Dist. Ct. App. 2005).

An easement in gross for overhead electric power transmission lines does not allow use of the burdened land for telecommunications purposes.

EQUITABLE CLAIM

29. In re AppOnline.com, Inc., No. 03-41678, 2005 U.S. App. LEXIS 165 (2d Cir., Jan. 24, 2005).

A title company that disbursed escrow funds on the basis of an uncollected check from loan originator had no equitable claim against a lender and mortgage company that provided funds to the loan originator, although they might have been aware of the risk that the originator would misappropriate money advanced by them to fund the loan. The title company brought the loss on itself by disbursing on the strength of an uncollected check.

30. Holta v. Concorde Acceptance Corporation, 2004 Cal. App. Unpub. LEXIS 8551

A mortgage lender funded a loan secured by a condominium unit, but the note and deed of trust were forged. After the condominium association foreclosed on an assessment lien, the foreclosure purchaser brought a quiet title action challenging the validity of the lender's deed of trust. The lender responded by seeking to be subrogated to the lien priority of a prior mortgage lender who had received the proceeds of the lender's loan. The foreclosure purchaser opposed the subrogation claim on the ground that the lender was guilty of negligence. The alleged negligence consisted of failing to use due care in approving the loan and failing failure to act immediately upon learning of the forgery. Also, the foreclosure purchase claimed that negligence of the escrow agent, who had allowed the borrower to take the loan documents outside closing, should be imputed to the lender. The court allowed subrogation because the lender was not chargeable with "culpable or inexcusable neglect." In so ruling the court held that the settlement agent's negligence would not be imputed to the lender because the settlement agent violated the lender's closing instructions, and therefore had acted adversely to the interests of his principal.

EQUITABLE SUBROGATION/CHAIN OF TITLE

31. Bank of N.Y. v. Nally, 820 N.E.2d 644 (Ind. 2005).

Owens sold property to Nally, who took back a purchase money mortgage, which was recorded prior to Nally's deed and a bank mortgage that was intended to be a first priority lien. Nally subsequently refinanced the bank mortgage, but the new lender did not discover the Owens mortgage. Therefore, the refinance lender's mortgage was subordinate to the Owens mortgage.

The refinance lender argued that the Owens mortgage was outside the chain of title because the mortgage was recorded prior to Nally's deed. The court rejected this argument, holding that the chain of title begins on the date of the deed to the grantee, not on the date that the grantee's deed is recorded. Therefore, Nally's mortgage was legally a first priority lien. A deed, when recorded, tells the world when title was transferred.

However, the court allowed the refinance lender to step into the shoes of the prior bank mortgage, which the court treated as a first lien, under the doctrine of equitable subrogation. The court ruled that negligence on the part of the refinance lender would be no bar to subrogation. Adopting the rule of the Restatement of Restitution, the court held that neither actual or constructive notice of an intervening lien would necessarily defeat a subrogation claim.

32. Hicks v. Londre, 107 P.3d 1009 (Colo. Ct. App. 2004).

The court considered three different approaches to whether notice of an intervening lien bars equitable subrogation: (1) actual notice precludes subrogation, but constructive notice does not (the majority rule); (2) actual or constructive notice bars subrogation; (3) neither actual nor constructive notice bars subrogation (the Restatement rule). The court adopted the majority rule.

33. Bank of America v. Wells Fargo Bank, 109 P.3d 863 (Wash. Ct. App. 2005).

Actual notice of intervening lien barred equitable subrogation.

ESCROW; ATTORNEY/CLIENT; INVESTMENT DECISIONS

34. Bazinet v. Kluge, 788 N.Y.S.2d 77 (App. Div. 2005); 2005 WL 22693 (N.Y. App. 1/6/05).

New York Appellate Court reverses trial court ruling exposing attorney to liability for investing escrow monies in failed bank. Held: Attorney had no liability for investing escrow funds in a bank that failed and has not duty to select safe bank. Common sense would suggest however that it is the client who should make business decisions and financial institution acting as escrow holder should be FDIC insured and not under FDIC screwtiny. Trial court decision may be found at 196 Misc. 2d231, 764 NYS2d 320, 2003 WL 21361746 (N.Y. Supp. 2003). For further analysis see DIRT Post 2/11/05. See also commentary by Harris Ominsky in The Legal Intelligencer Vol P. 2599.

ESCROW

35. Brown v. Old Republic Title Co., No. A105797, 2005 Cal. App. Unpub. LEXIS 769 (Ct. App. Jan. 27, 2005).

Old Republic acted as escrow agent. Brown, purchaser, orally instructed Old Republic to obtain fire insurance. Old Republic failed to obtain the insurance, and the building was lost due to a casualty. Held: oral contract enforced against Old Republic.

36. Ramos Oil Company, Inc. v. Fidelity National Title Agency of Nevada, Inc., No. C044936, 2004 Cal. App.Unpub. LEXIS 8193 (Ct. App. Sept. 8, 2004).

The lender, an oil company, advanced $175,000, to a borrower and a broker to enable the borrower to satisfy a condition of a construction loan from a third party. The borrower and broker deposited the funds in escrow with Fidelity. Acting on their instructions, Fidelity disbursed the money to the borrower, who failed to repay the loan. The lender sued Fidelity to recover the money, but the court sustained Fidelity's demurrer because the lender was not a party to the escrow; therefore, Fidelity owed no duty to the lender.

37. The People v. Marcus McLaughlin, No. E034379, 2004 Cal. App. Unpub. LEXIS 7678 (Ct. App. Aug. 20, 2004).

Attorney was convicted of the crime of operating as an escrow agent without a license

38. Shepard v. Fidelity National Title Insurance of California, 2004 Cal. App. Unpub. LEXIS 9780.

Oral testimony was inadmissible to contradict a settler's written payoff instructions to Fidelity, and Fidelity was entitled to follow those instructions.

39. Dreibelbiss Title Company, Inc. v. Fifth Third Bank, 806 N.E.2d 345 (Ind. Ct. App. 2004).

An Indiana court of appeals has held that a lender may not be required to release a credit line mortgage, after the loan was "satisfied", where the borrower failed to submit a written request to close the account. Payoff of a home equity line of credit without a letter from the borrower requesting that the line of credit be terminated did not terminate the line of

credit or the mortgage securing the line of credit. A subsequent advance to the borrower under the line of credit was secured by the credit line mortgage. Bert Rush's analysis may be found in the LandSakes post of April 1, 2005.

FORECLOSURE

40. ABN AMRO Mortgage Group v. Jackson, 824 N.E.2d 600 (Ohio Ct. App. 2005).

ABN filed suit for judicial foreclosure of an unrecorded mortgage. ABN also filed a memorandum of lis pendens, but the memorandum identified the property only by street address. Pending the foreclosure, the borrower sold the property, and the purchaser claimed that he acquired the property free and clear of ABN's claims. The court held otherwise, holding that the memorandum of lis pendens put the purchaser on notice of ABN's asserted interest in the property, which meant that the purchaser acquired the property subject to the outcome of ABN's suit.

41. Melendrez v. D&I Investment, Inc., 26 Cal. Rptr. 3d 413 (Ct. App. 2005).

The court rejected the proposition that an experienced foreclosure sale purchaser who acquired property at a foreclosure sale for significantly less than fair market value could not be a bona fide purchaser.

FRAUDULENT CONVEYANCE

42. Collard and Roe, P.C. v. Klein, 865 A.2d 500 (Conn. App. Ct. 2005).

This was a case to set aside a judgment debtor's fraudulent transfer of property to his wife. The court accorded full faith and credit to a New York judgment recorded in Connecticut. The court also held under Connecticut law that a deed signed without two witnesses is void.

FRAUD

43. Lawyers Title Insurance Corporation v. Phillips Title Agency, Inc., 361 F. Supp. 2d 443 (D.N.J. 2005).

Attorney Phillips did closings for title agents in South Jersey. In one of those transactions, he forged the name of a property owner on a deed and the name of a purported purchaser on a mortgage. The end result was that Phillips stole $500,000 from the lender, Option One. The closing was conducted by an employee of Phillips Title Agency, Inc., which Phillips owned. In conducting the closing, Phillips Title Agency, Inc., acted as a sub-agent for Central Title Agency, an agent of Lawyers Title. After Lawyers Title paid Option One's claim, Lawyers Title sued Central Title,

Phillips Title, Phillips and others to recover the loss. The court held that Central Title was liable to Lawyers Title under principles of agency law for the negligence of Phillips Title's employee who conducted the closing.

44. Aftermath of Erpenbeck; Misc. Media Coverage. Our readers may recall this defalcation was addressed in considerable detail at the ALTA Title Counsel Meeting held in New Orleans in 2003. Erpenbeck, a builder in northern Kentucky, committed multiple frauds through captive title insurance agency. He inducted title company to give him payoff checks, which he diverted for other purposes. The pyramid scheme eventually collapsed. Owners did not obtain policies. There was a general discussion regarding defalcation problems, and increases in the number of defalcations committed by attorneys.

45. State of New Jersey v. Harris, 861 A.2d 165 (N. J. Super. Ct. App. Div. 2004).

Sonya Harris, attorney, was convicted under N.J. money laundering statute for assisting a flip artist obtain fraudulent loans.

HEIRSHIP

46. In re Estate of Thomas, 853 So. 2d 134 (Miss. 2003).A conservator received two deeds of gift from her ward. The deeds were set aside, and the conservator's request for compensation for her services also was denied. A person under conservatorship may not convey property without court approval, which was not obtained. The conservator's request was untimely because it was not made with the conservator's final accounting.

INDEMNIFICATION

47. Kohlbrand v. Ranieri, 159 Ohio App. 3d 140 (Ct. App. 2005).

Subdivider sold lot to individual by warranty deed, but failed to take exception for a pipeline easement. The deed warranted that title was "clear, free and unencumbered," and that the grantor would defend the title against the claims of all persons whomsoever. The defendant argued that "free and clear" title meant only marketable title. The court disagreed. "Free," "clear" and "unencumbered" all mean the same thing. The Court traced the use of redundant word to the Norman conquest of England in 1066, after which lawyers in England used English words and their French equivalents in preparing legal documents.

48. Commonwealth Land Title Insurance Company v. 167nd Street Equities, Inc., 5 Misc. 3d 1017A (N.Y. Sup. Ct. 2004).

Commonwealth sued Green under indemnity to protect Commonwealth against judgments and liens. Although Green signed indemnity in the name of a corporation, he was personally liable under indemnity agreement because

the corporation had been terminated prior to the date of the indemnity agreement.

49. Fidelity National Title Insurance Company v. Marks, No. A105153, 2004 Cal. App. Unpub. LEXIS 9756 (Ct. App. Oct. 26, 2004).

The Court agreed with the defendant that an indemnity agreement was intended to be a corporate obligation rather than an individual obligation, even though defendant Marks apparently had signed the document in his individual capacity. The indemnity agreement has been induced by fraud, and was therefore void, because the indemnity agreement was ambiguous as to the capacity in which Marks signed it, and a Fidelity employee had represented to Marks that the document in question was a seller's indemnity agreement against mechanics liens. Marks was not the seller, but only an officer of the seller.

INDIAN LAND

50. Delaware Nation v. Pennsylvania, (appeal pending in United States Court of Appeals for the 3d Circuit).

This is a land title dispute between the Commonwealth of Pennsylvania and the Delaware Indian tribe. The brief discusses the history of Pennsylvania land titles and Pennsylvania's treaties with the aboriginal peoples. The trial court case was previously discussed in the Title Management Today Title Gram for November 2004 item 24, exhibit 37.

51. City of Sherill, N.Y. v. Oneida Indian Nation of New York, 125 S.Ct. 1428 (2005).

This decision of the United States Supreme Court summarizes the recent judicial history of Indian land claims. The Oneida tribe left upstate New York in the 1800s. Some tribal members bought their old lands back in the late 1900s, and claimed tax exemptions. Held: Indian claims could be barred by equitable defenses, in this case laches.

52. Cheyenne - Arapahoe Tribes of Oklahoma claims to land and water rights in Colorado

Colorado constitution requires statewide referendum approval of additional gambling casinos. White developer asserts claim on behalf of Cheyenne/Arapaho to eastern 2/3 of the state. However, would settle for land near Denver International Airport and a casino. Department of Interior denied the tribes' claims, and an administrative law judge found that reparations previously had been paid in full satisfaction of the tribes' claims.

INSURERS' OPTION TO SETTLE

53. Fiege v. Cooke, 23 Cal. Rptr. 3d 496 (Dist. Ct. App. 2004).

An insurer's contractual right to settle a claim without the insured's consent is enforceable. This case dealt with a California automobile liability insurance policy. However, the ALTA 1992 loan policy contains same clause

LEASES - SIXTEENTH SECTION SCHOOL PROPERTY

54. Lipscomb v. Columbus Municipal Separate School Dist. No. 1, No. 1:92CV020-D-D (N.D. Miss., February 24, 2005).

The Court approved a settlement of a class action case that upholds perpetual renewal provisions of ground leases in Columbus, Mississippi that pre-date Mississippi's Constitution. The Stipulation of Settlement provides that the 1830 statute authorizing these leases did not violate the public trust doctrine, and that the Contracts Clause of the constitution protects the leases.

LIENS

55. In re Snavely, 314 B.R. 808 (BAP 9th Cir. 2004)

Miller obtained judgment against Snavely in the United States Bankruptcy Court in Montana and recorded certified copies of the judgment in two counties in Montana where Snavely owned property. Savely subsequently filed a Chapter 11 petition in a United States Bankruptcy Court in Washington and moved to avoid the judgments. Held: the judgments were aviodable because Montana law requires a judgment creditor to record a transcript judgment document, and Miller failed to record such a transcript.

LINE OF CREDIT

56. In re Bank One, No. 04 CV 167 (Dist. Ct. Boulder Co. Colo. April 29, 2004).

A credit line mortgage was terminated by the bank's acceptance of a check for the full loan balance tendered under cover of a "final payoff letter" requesting that the payment be accepted in satisfaction of the mortgage.

MARKETABILITY

57. Teague v. Bisceglia, 2005 Mass. Super. LEXIS 88 (Sup. Ct. Plymouth Ma.)

Seller's refusal to sign a title affidavit required by the purchaser's title insurance company was not a breach of a

contract to sell real estate because no provision of the contract required the seller to sign an affidavit, and the seller performed all of his obligations under the contract.

MECHANICS LIEN

58. Gem Plumbing v. Rossi, No. 2003-0386-Appeal ®. I. Supreme Ct. 2005)

Rhode Island's mechanics lien statute survived a challenge asserting that the statute violated the procedural due process guaranty of the 14th Amendment to the United States Constitution. The opinion summarizes United States Supreme Court decisions addressing the question of whether various pre-judgment remedies violate the guaranty of procedural due process.

MISREPRESENTATION; RESPA

59. Contawe v. Crescent Heights of America, 2004 U.S. Dist LEXIS 20344 (E.D. Pa.)

Condominium owners brought suit against title insurance agent alleging several violations of law, including RESPA, contract and fiduciary duty arising out of agent's failure to identify zoning status or property and parking rights. The court held a private party has no standing under RESPA unless the complaint alleges that it was charged excess fees. The case further holds (1) an escrow agent had no duty to supply title information; (2) misrepresentation by title agent would not give rise to claim under RESPA in the absence of a kickback or increased settlement charge and (3) actual damages from referral arrangement are required to sustain lawsuit . Other claims against the title agent were also dismissed.

Crescent Heights, a condominium developer, allegedly required unit owners to close through a title agent, SearchTec (an agent for Stewart Title). SearchTec allegedly failed to identify the true zoning status of the property and misrepresented that there was deeded parking, said failures allegedly being quid pro quo for Crescent Heights's business referrals to SearchTec. SearchTec filed a motion to dismiss the plaintiff's claims under RICO and RESPA, as well as claims for breach of contract, breach of fiduciary duty and unjust enrichment. Held: (1) RICO claim was dismissed for failure to allege predicate acts; (2) RESPA claim was dismissed because liability under RESPA is limited to the "kicked back" portion of a settlement charge, and the plaintiff failed to allege that SearchTec did anything that increased the settlement charges to the plaintiff: (3) the breach of contract claim was

dismissed because a settlement agent who arranges for title insurance does not contract to provide the proposed insured with title information; (4) the breach of fiduciary duty claim was dismissed because a title insurance agent is not a fiduciary under Pennsylvania law; and (5) the unjust enrichment claim was dismissed because the complaint failed to allege anything more than that SearchTec received a payment for conducting a closing, a service that SearchTec actually rendered. Further analysis may be found in the PLTA news magazine Common Ground, issue 4, 2004 at page 12.

Misrepresentation; Negligence; Economic Loss Doctrine; Coverage Issues; Claims; Contrat v. Tort Theory

60. First Midwest Bank v. Stewart Title Guaranty. Co., 823 N.E.2d 168 (Ill. App. Ct. 2005).

The case discusses the controversy over the question of whether, and under what conditions, a title company or settlement service provider may be liable for negligence. Held: (1) payoff terminates a loan policy, even if the payoff resulted from a refinancing by the same lender; and (2) no claim for negligent misrepresentation will lie under a title insurance policy, even if the policy failed to take exception for a recorded encumbrance. The second holding was based on the economic loss doctrine, which holds that recovery for purely economic losses lies only in contract. The exception applicable to contracts to supply information was inapplicable because a title insurance policy is not a contract to supply information. The business of an insurance company is to accept risk for a fee; not to supply information. A more complete analysis and commentary by Bert Rush may be fond on the Firstam LandSakes Post of March 23, 2005.

MORTGAGES

61. Frances Kenny Family Trust v. World Savings Bank, No. C 04-03724 WHA (N.D. Cal., Jan. 19, 2005).

The case involved a dishonest foreclosure prevention scheme under which a scam artist recorded a forged release in order to save the borrower from foreclosure. The attempt did not succeed, and the attorney who represented the scam artist was sanctioned and referred to the state bar disciplinary committee for possible disbarment. The theory asserted by the scam artist was that the lender's deed of trust was unenforceable because the lender had funded the loan by a wire transfer, rather than cash, and a wire transfer was only "vapor money." The court held that the vapor money theory was not asserted in good faith.

62. Countrywide Home Loans, Inc. v. Kim, 898 So. 2d 250 (Fla. Dist. Ct. App. 2005).

Countrywide made mortgage loan to Tricia and Michael Abdulahad, who owned property as tenants by the entirety. Tricia failed to sign the mortgage, but this was the result of inadvertence because she attended the closing, knew that the loan proceeds would be used to buy a house for Michael and herself, and would have signed the mortgage, if asked. When the Abdulahads sold the property, the settlement agent inadvertently failed to pay off Countrywide, which subsequently filed foreclosure proceedings against the new owners, the Kims. Held: Countrywide's mortgage was reformed to be a valid lien on the property. Presumably, the Kims' title insurer had to pay it off. The decision cites various Florida cases holding that, in a proper case, an instrument may be reformed to supply a necessary signature.

Mortgage Impairment

63. Radian Guaranty v. Garamendy

Included in preliminary discussion. See Title Management Today Current Developments discussion in Vol. 13. No. 12 at page 5. Not discussed later.

Negligent Examination

64. Southern Land Title, Inc. v. North Georgia Title, Inc., 606 S.E.2d 43 (Ga. Ct. App. 2004)

American Pioneer recouped a loss from negligent agent, who had missed two conveyances of the subject property. That the purported seller produced a fraudulent release of a security deed was immaterial because the agent should have realized that the purported seller was not in title and, therefore, should have aborted the closing.

Notice

65. Pankratz Implement Co. v. Citizens Nat'l Bank, 102 P.3d 1165 (Kan. 2004)

Under revised Article 9 of the UCC, a creditor filing a security interest is under a duty to use the debtor's exact name when filing a financing statement so that potential searching creditors are under no duty to search for name variations. In the instant case Rodger House, in 1998 bought a tractor from Pankratz. John Deere, assignee of purchase money loan, filed a finance statement under the name of House, Roger (spelled without a d). One year later, Rodger House granted a blanket lien to Citizens National Bank, which filed a financing statement under Mr. House's name, with the given name Rodger spelled correctly. Two years after that, Rodger House filed a

bankruptcy petition. The court held that the Bank's lien had priority over the seller's lien because the UCC-1 filed for the seller misspelled Rodger's name as Roger. Under Section 9-506 of the UCC, a financing statement is considered "seriously misleading," and fails to impart constructive notice, if it fails to identify the debtor by his correct name. The only exception to this rule applies if the financing statement could be found using the recording office's standard search logic, if any. The exception was inapplicable because the recording office's standard search logic would not have found a financing statement under the name of Roger House if a creditor searched the financing records for security interests granted by Rodger House.

66. Wallace v. Frontier Bank, No. 1030814, 2004 Ala. LEXIS 339 (Ala. Dec. 17, 2004).

A good faith purchaser is not affected by a suit to set aside his grantor's title as a fraudulent transfer. A judgment outside the chain of title does not impart constructive notice. A title insurance company's knowledge will not be imputed to customer

67. Guaranty Bank and Trust Co. v. Lasalle National Banking Association, No. 03CA1309 (Colo. Ct. App. 2004).

An omission of the subdivision block number from a legal description in a deed of trust will not necessarily render the deed of trust invalid. In this case, the omission was not fatal because each lot in the subdivision had a unique number, although the lots were in separate blocks

68. Myung Woo Nam v. Hyung Do Min, No. G032269, 2004 Cal. App. Unpub. LEXIS 10266 (Ct. App. Nov. 9, 2004).

A memorandum of lis pendens was filed between date through which title plant was current and date purchaser's deed was recorded. Held: the lis pendens took priority over deed.

OPTIONS

69. 1464-Eight, Ltd. v. Joppich, 154 S.W.3d 101 (Tex. 2004)

In a case of first impression in Texas, the Texas S.Ct. has held that an optionee's failure to pay the nominal consideration of ten dollars recited in the contract will not render the contract unenforceable. This is a significant case in Texas. Prior case law held that without "independent consideration" for an option, the option is not enforceable. In doing so the court decided to incorporate into the common law of Texas section 87(1)(a) of the Restatement (Second) of Contracts, which provides that non-payment of a nominal consideration recited in an option contract does not preclude enforcement of the agreement. The court determined that the requirement for consideration is satisfied, as to an option, if: (1) the option recites nominal consideration, (2) the underlying exchange is fair, and (3) the optionee exercises the option within a reasonable time.

70. Knott v. Racicot, 812 N.E.2d 1207 (Mass. 2004).

This case also adopted the Restatement view that an option need not be supported by actual consideration. The Court used the case as a vehicle for holding that a seal no longer substitutes for consideration in Massachusetts.

PRESCRIPTIVE EASEMENTS

71. Amstutz v. Everett Jones Lumber Corp., 604 S.E.2d 437 (Va. 2004).

To establish an easement by prescription the adverse use must be of such frequency and continuity to give landowner reasonable notice that a right is being exercised against him. To establish an easement for logging purposes the person claiming the easement would need to have used the road with some regularity for logging purposes over the 20 year period. The occasional use of the road within the 20 year period without actual timbering more than once every decade would not constitute the requisite adverse use, which must relate to the purpose of the claimed prescriptive easement.

72. Hefazi v. Stiglitz, 862 A.2d 901 (D.C. 2004).

A property owner enlarged his house so that the wall was on the lot line, obstructing his neighbor's window. The neighbor sued, claiming a prescriptive easement for light and air. Held: (1) A negative easement cannot be created by prescription. Prescription requires some act that is wrongful to another owner's property rights. Maintaining a window does not wrong to the owner of the adjoining parcel. (2) The statutory 15 year period had not expired because the neighbor had owned both properties for part of the period. One cannot obtain prescriptive rights against himself. (3) The pre-existing use doctrine is inapplicable because an easement for light and air is not reasonably necessary for the use of and enjoyment of the neighbor's property.

POLICY COVERAGE

73. Stevens v. Dakota Title & Escrow Co., 2004 WL 2381386 (Neb. Ct. App.).

When Stevens bought property in Omaha, he obtained a title commitment and policy that failed to disclose a buffer zone agreement. 10 months later Stevens conveyed property to his wholly owned corporation, Aslan. Aslan's title

insurance commitment and policy did disclose the buffer zone agreement. Aslan subsequently constructed a building in the buffer zone, whereupon homeowners successfully sued to enforce the buffer zone easement. Stevens then sued his title insurer, Lawyers Title, to recoup the loss. Held: (1) although Nebraska recognizes a claim against a title insurer for negligent abstracting, the statute of limitations barred the plaintiff's claim. (2) The insured's reacquisition of part of the property did not revive the policy. (3) Stevens had no warranty liability to Aslan because Aslan purchased the property with knowledge of the title problem.

74. Alemeda Corridor Transportation Authority v. Stewart Title Guaranty Co., 119 Fed. Appx. 111 (9th Cir. 2004).

Insured had notice of a missed sewer line easement when the insured received a map showing the sewer line. This commenced the period of limitations, which expired prior to the filing of the suit. Knowledge of the facts that give rise not a claim, rather than knowledge that the insured has a claim, commences the running of the statute.

Stewart prevailed also on the alternative ground that the insured suffered no loss because a third party rather than the insured bore the cost of relocating the sewer line.

75. Vestin Mortgage, Inc. v. First American Title Ins. Co., 101 P.3d 398 (Utah Ct. App. 2004).

A municipal notice of an intent to create a future special improvement district is not a title defect within the meaning of a title insurance policy's insuring clauses. The assessment for the special improvements was not levied until after the policy's effective date, and therefore came within the exclusion for post policy title defects. The police power exclusion, which does not exclude police power notices recorded in the public records, would not be interpreted to create coverage of a matter not otherwise covered.

76. Lawyers Title Insurance Corporation v. Wells, 881 So.2d 668 (Fla. Dist. Ct. App. 2004).

Insured lender sued Lawyers Title on allegations that the mortgage was forged. However, the court ruled for Lawyers Title because the debt secured by the mortgage was usurious. Therefore, the lender had no insurable interest in the property.

77. Chicago Title Ins. Co. v. The Kent School, 361 F. Supp. 2d 4 (D. Conn. 2005).

After incurring $700,000 in legal defense costs under a $100,000 policy, Chicago Title sought to terminate its defense obligation by paying policy limits. Court held that Chicago Title had no right under the 1966 policy form to take this action, but observed in a footnote that Chicago Title would have been within its rights under the 1992 policy form.

PRIORITY

78. Key National Bank v. Adams, No. 02AP-1293, 2003 Ohio App. LEXIS 5883 (Ct. App. Dec. 11, 2003).

Mortgage company was denied subrogation where it knew when it made the loan that a subordination agreement would be required to give the mortgage company the lien position it claimed.

79. MERS v. Odita, 159 Ohio App. 3d 1 (Ct. App. 2004)

Second mortgage was executed by corporate officer in individual capacity. Mortgage was re-executed, but the acknowledgment was defective because it failed to recite that the officer signed in his capacity as an officer of the corporation. Held: (1) the mortgage was defective and did not impart constructive notice; and (2) the invalid mortgage was ineffective even as to a subsequent mortgage who knew about the invalid mortgage through a title search. Reformation of the invalid mortgage would not be allowed to the prejudice of the subsequent mortgagee under a valid mortgage.

80. MERS v. Phylactos, No. 03C9255, 2005 U.S. Dist. LEXIS 6295 (N.D. Ill. Mar. 30, 2005).

MERS made a loan notwithstanding memorandum of lis pendens. Equitable subrogation denied because MERS knew about the lis pendens and, if it intended to step into the shoes of a lender with priority over the lis pendens, MERS could have made an agreement to do so instead of paying off the prior lender.

81. Commercial Credit Recovery Service v. Dhillon, 2005 WL 91302 (Cal. Ct. App.)

A notice of lis pendens was recorded prior to the recordation of the plaintiff's abstract of judgment. Therefore, the lis pendens took priority over the judgment.

RESPA

82. PMI Mortgage Ins. Co. v. American Specialty Lines Ins. Co., 394 F.3d 761 (9th Cir. 2005)

PMI allegedly undercharged lender clients for various insurance products in exchange for referral of private mortgage insurance business. Alleged RESPA violations were covered by the mortgage insurer's professional liability insurance policy.

83. Hardcastle v. Bank of America, 2005 Cal. App. LEXIS Unpub. 252 (5th Dist.)

Borrower sued to get his promissory note back from the bank and the foreclosure trustee (First American) following a foreclosure sale. The trial court sustained First American's demurrer, and the borrower's appeal was untimely. The court noted that there is no fiduciary relationship between debtor and creditor.

RIGHT OF REDEMPTION

84. Wyse Financial Services, Inc. v. National Real Estate Investment, LLC, 92 P.3d 918 (Colo. 2004).

There was no discussion of this item.

RULE AGAINST PERPETUITIES

85. The Arundel Corp. v. Marie, 860 A.2d 886 (Md. 2004).

Maryland's statutory modification of the rule against perpetuities did not save a right of first refusal that would otherwise be void under the rule. In 1960, the Maries sold part of their land to Arundel Corporation, together with right of first refusal as to the residue: if the Maries or their heirs ever sell the residue, they will first offer it to the Arundel Corporation for $2250 per acre. After the Maries died, their heirs sought consent from Arundel to sell the property without making the offer called for by the first refusal. Arundel took the position that the heirs' request triggered the right of first refusal and sued the heir to compel them to sell the property. Arundel lost.

The Rule Against Perpetuities holds that no interest is good unless it must vest, if at all, not later than 21 years after some life in being at the creation of the interest. A Maryland statute modifies the rule by providing that in applying the rule to an interest to take effect at or after the end or a life or live in being, the validity of the interest shall be based on the facts that exist at the time of the termination. The statutory modification was inapplicable because the interest in question was not required to vest at or after the termination of a life in being.

The opinion reviews the approaches that various states and the Restatement of Property have taken to modifying the common law rule against perpetuities

86. Selig v. State Hwy. Admin, 861 A.2d 710 (Md. 2004).

A former provision of the Transportation Article of the Maryland Code abrogated the Rule Against Perpetuities as to certain contracts with the State Highway Commission giving a seller the right to repurchase property not needed for transportation purposes. The court held the "Rule" does not apply to a right of first refusal in a contract and deed dealing with property acquired for public purposes by the Highway Commission when the language in the

right is mandated by statute. Further analysis prepared by Professor Randolph may be found on the revised DIRT Post of 2/25/05 [Rule of Perpetuities vs. Statutorily Mandated Option Right].

TENANCY BY THE ENTIRETY

87. In re Kelly, 316 B.R. 629 (D. Del. 2004).

Delaware presumes that conveyance of land to a husband and wife creates a tenancy by the entirety. The Delaware statute that allows one spouse to convey to himself/herself and the other spouse as tenants by the entirety does not alter the common law presumption as to a deed that fails to specify the tenancy of a husband and wife.

88. In re Sampeth, 314 B.R. 73 (Bankr. E.D. Va. 2004).

A deed to a husband, wife and daughter as joint tenants with common law right of survivorship was held to create a tenancy in common between the husband and wife as to a 2/3 interest in the property even though the deed did not specify the marital statute of the grantees. The scholarly opinion includes a discussion of the history of tenancies by the entirety citing, among other sources, Blackstone's commentaries on the law of England.

89. Popky v. United States, 326 F.Supp. 2d 594 (E.D. Pa. 2004), 2005 U.S. App. LEXIS 8951 (May 17, 2005).

On appeal from the district court's ruling for summary judgment in favor of the government for satisfaction of a tax lien, the appellants, husband and wife argued that a federal tax lien could not attach to the wife's interest in property owned by her and her husband as tenants by the entireties. The Court of Appeals for the Third Circuit held that, the property rights by and individual holding property with another as tenants by the entireties is a sufficient property interest to which a federal tax lien could attach. This decision applied the rule of United States v. Craft (one spouse's interest in tenancy by the entirety property is subject to a federal tax lien) to tenancy by the entirety property governed by Pennsylvania law. The Court ruled that each spouse would be regarded for this purpose as holding a 50% interest in the property. Further analysis may be found in PLTA Common Ground, Issue 3, 2005 page 16 and the Legal Intelligencer for 10/10/05 VOL P. 7477.

90. In re Murray, 318 B.R. 211 (Bankr M.D. Fla. 2004).

This cases applied United States v. Craft to property in Florida held in tenancy by the entirety. Instead of holding that each spouse would be regarded as owning a 50% interest in the property for purposes of determining the interest to which an IRS lien would attach, the Court determined the husband's and wife's interests based on their different life expectancies

TENANCY, JOINT

91. Taylor v. Canterbury, 92 P.3d 961 (Colo. 2004).

One joint tenant may sever a joint tenancy with right of survivorship by conveying his interest to himself as a tenant in common. No straw deed required

TITLE COMPANY RECOVERY

92. Poling v. Palm Coast Abstract and Title, Inc., 882 So. 2d 483 (Fla. Dist. Ct. App. 2004).

A title agency that overpaid the seller of property at a closing successfully sued the seller to recover the overpayment.

TITLE INSURANCE/LENDER'S POLICY

93. First Midwest Bank v. Stewart Title Guar. Co., 823 N.E.2d 168 (Ill. App. Ct. 2005). This item was not discussed on Tuesday. It is the same as Item 60 discussed on Monday.

TRUSTS

94. Heaps v. Heaps, No. GO 33133 (Cal. Ct. App. 1994).

The Heapses enter into a revocable living trust, which was to become irrevocable on the death of either spouse. The trust was to split upon first death to maximize the value of the federal estate tax exemption. Trust's asset was a residence. The Heapses conveyed the property to the trust by a quitclaim deed that was delivered to the Heapses attorney but not recorded. Thereafter, the Heapses sold the property, taking back a $236,000 wrap-around deed of trust in favor of the Heapses as joint tenants. After the wife died, the husband remarried, established a trust with his new wife, and purported to fund the trust with the wrap-around deed of trust. The beneficiaries of the original trust objected, contending that the first trust became irrevocable when the first Mrs. Heaps died. The beneficiaries prevailed. The court held that the original marital trust was never revoked prior to the death of the first Mrs. Heaps, and that, upon her death, the trust had become irrevocable.

95. Gardenhire v. Superior Court of Santa Clara County, No. H026601 (Ct. App. 6th Dist. March 25, 2005).

A living trust provided that the trustor could revoke it by written notice to the trustee, who was the same person as the trustor. The court held that the trustor's execution of a will that was inconsistent with the trust constituted a written notice that was sufficient to revoke the trust.

96. Whalen v. Shepler, 104 P.3d 243 (Colo. Ct. App. 2004).

When a junior creditor obtains a judgment debtor's equitable interest in property (as opposed to legal title) through a creditor's bill, the junior creditor takes priority over judgment creditors who would have been senior in priority, by virtue of recording transcripts of judgments, if the debtor had held legal title.

UNAUTHORIZED PRACTICE OF LAW

97. Toledo Bar Association v. Chelsea Title Agency of Dayton, 800 N.E.2d 29 (Ohio 2003).

In Ohio the preparation of deeds by a title agency by filling in the blanks on attorney approved forms is the unauthorized practice of law.

98. In re Fortson, 606 S.E.2d 461 (S.C. 2004).

Under South Carolina law, making disbursement in connection with a closing is the practice of law.

WARRANTY

99. Wilkinson Homes, Inc. v. Stewart Title Guar. Co., 610 S.E.2d 187 (Ga. Ct. App. 2005).

Wilkinson Homes conveyed a house to Conard in 1999 with general warranty of title. A survey prepared in 2000 showed that Conard's driveway encroached on a neighbor's property. Stewart paid the neighbor $40,000 for a quitclaim deed, and sued Wilkinson Homes under its general warranty of title to recover the loss. Held: (1) Stewart was subrogated to Conard's warranty claim against Wilkinson Homes, and Stewart's alleged negligence was no defense to subrogation; (2) Stewart was not a volunteer because the policy's survey exception provided no defense to Conard's policy claim; (3) Wilkinson Homes was liable to Stewart for breach of warranty; and (4) the jury would determine Stewart's damages. The Court of Appeals noted that yielding to paramount title is an eviction sufficient to create liability under a deed warranty. The survey exception was inapplicable because the survey accurately disclosed the lot lines per the legal description in Conard's deed. The loss of title did not result from a survey error but instead from the incorrect legal description.

100. Bedard v. Martin, No. 03CA813 (Colo. Ct. App. 2004).

The measure of damages for breach of a deed warranty in the case of a total failure of title is the purchase price of the property plus the purchaser's litigation costs in defending his title against the claims of the true owner. This case contains a good discussion of the issue and notes the existence of contrary authority outside Colorado

WATER RIGHTS

101. WRCW, LLC v. City of Arvada, 107 P.3d 1002 (Colo. Ct. App. 2004).

In Colorado water rights are separate from interests in land. Therefore, the an access easement that gave the owner of a dominant parcel access over the servient property did not give the owner of the dominant parcel access to water rights he later acquired in the servient property. The scope of the easement would not be expanded by the fact that the owner of the dominant estate subsequently acquired more property.

ZONING

102. Mayor of Clinton v. Welch, 888 So. 2d 416 (Miss. 2004).

A municipal zoning ordinance which prohibited accessory buildings and accessory uses in a front yard was impermissibly vague as applied to a large tree house.

LEGISLATION AND REGULATION

103. Colorado Division of Insurance Order O-05-155

Colorado Division of Insurance ordered LandAmerica companies to cease and desist doing business with captive reinsurance companies owned by builders.

104. Colorado Division of Insurance Order O-05-143

Colorado Division of Insurance entered into settlement agreement with First American requiring First American to make restitution to title insurance purchasers for premium amounts that First American paid to captive reinsurance companies owned by builders.

105. Virginia Bureau of Insurance Administrative Letter 2004-07

This administrative letter prohibited negotiated rates except where risk differences justified the rate differences. A new statute has been enacted that appears to overrule the administrative letter to allow negotiated rates.

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My wife and I want to wish you and your families a healthy and happy holiday season. This year, more than in previous years, we ask that you help those less fortunate than ourselves. The victims of hurricane Katrina and Rita have overwhelmed the resources of the Federal Government, the Red Cross, United Way, the Salvation Army and numerous other charitable organizations and relief agencies throughout the country. We ask that you reach out to help those who are unable to help themselves by contributing generously to the organization of your choice. Please share some holiday spirit with the storm victims who are in need of basic necessities such as food, water, clothing, and shelter. And remember, but for the grace of god there go I. Thank you.

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