

Title Management Today

Title Comments

A PUBLICATION OF TITLE LAW ASSOCIATES, LLC.

CURRENT DEVELOPMENTS OF INTEREST TO OUR SUBSCRIBERS

Fidelity National Raises its Bid for Fidelity National Information Solutions, Inc.

Fidelity National Financial Inc., [FNF] the parent of the nation's largest title insurance company, has slightly raised its all stock offer for the 34% of Fidelity National Information Solutions, Inc. that it does not already own. The percentage not owned by FNF is owned mostly by outside institutional investors. Chairman and Chief Executive William P. Foley 2d said in a July 15 interview that full ownership of the company, whose main business is providing real estate valuation services, would give his company "the full spectrum of products and services" to offer bankers for both mortgage and core bank services.

Fidelity National Financial started the company along with a technology firm called VistaInfo in August of 2001. The company originally offered services to, inter alia, environmental businesses and multiple listing services. The unit became more focused on the real estate and mortgage lending markets in March of 2002, after the environmental business assets were sold.

In an unsolicited bid on May 23, 2003, FNF offered 0.805 of its shares for each share of Fidelity National Information Solutions, Inc. now in outstanding hands. After the market closed on July 11th it said it had agreed to raise that offer to 0.83 shares.

In a related move FNF bought Alltel Information Services April 1, 2003 from the telephone company Alltel Corp. of Little Rock, Arkansas and renamed it Fidelity Information Systems. That unit is the nation's largest mortgage processor and sells core banking software, among other things.

Refinancing Boom slips 1.6%

The refinancing boom continues strong but figures as of July 17th presented in the *American Banker* show they are past the peak hit in June, and were down 1.6% from the previous week. Applications for purchase loans are also of their June peak but up 8% from the previous week. Analysts with the research firm of Loan Performance Inc., of San Francisco, reported that loan originations have started to drop in cities such as Dayton, Indianapolis, San Antonio and Dallas.

Radian; Commissioner Garamendi Rejects Unregulated Title Insurance

California Department of Insurance Sustains Cease and Desist Order against Radian

The California Land Title Association applauded Insurance Commissioner John Garamendi's Final Decision and Order that prevents the Radian Corporation - a mortgage guaranty insurance company based in Philadelphia - from introducing unregulated title insurance products in California.

You may view the bulletin from the CLTA website at:

http://www.clta.org/News/NewsExpress/bull0304-12_GaramendiRejects.htm

SELECTED CASES WHICH MAY BE OF INTEREST

Bankruptcy; Tenancy by the Entireties; Evaluating a non-debtors Spousal Interest in Bankruptcy

In a recent case, bankruptcy judge, Diane Weiss Sigmund, was faced with the issue of having to evaluate a husband's interest in a residence held as entireties property with his wife. In re Basher v. United States of America, 291 B.R. 357; 2003 Bankr. LEXIS 314 (March 28, 2003). In that case the husband/debtor under a Chapter 13 plan sought to reduce the secured portion of the Internal Revenue Service's claim based on the values he attributed to the residence he occupied with his wife. The wife was not in bankruptcy and the issue arose in an attempt to "cram down" the IRS's lien which attached to his interest. The debtor's position was that his value in the residence should be valued only at zero, but the IRS argued that his interest was 50% of the equity.

Several articles, including one written in this column, pointed out that last year the United States Supreme Court in United States v. Craft, 535 U.S. 274 (2002), left this issue undecided when it concluded that a federal tax lien against a husband's interest in a tenancy by the entirety was a lien against his interest in the real estate. See Ominsky's Terrain, U.S. Supreme Court Pierces Veil of Tenancy by Entireties, The Legal Intelligencer, May 6, 2002. We anticipated that in the future, Courts would be faced with the difficult issue of how to calculate the value of the debtor's interest.

Zero Value

Judge Sigmund in a scholarly and well-reasoned opinion has now dealt with that issue. She concluded that neither the IRS nor the debtor was correct in their analysis. The debtor had argued that for purposes of calculating how much the tax lien could be crammed down under § 1325 of the Bankruptcy Code, the court should use the price that the husband could get if he sold his tenancy by the entirety's interest, and since that interest essentially is not saleable without the wife's consent, he reasoned that the value is zero.

Sigmund rejected that reasoning because the nature of that type of tenancy is that the husband

can use and enjoy the property until the tenancy by the entirety is broken, and that right plus his likelihood of survival, rather than what he could sell his interest for, should be the measure of value. She pointed out that at least to the IRS, which has unique federal statutory lien rights, the value on a sale would not be zero because the IRS has the ability to seek a forced sale and would be likely to realize the actual market value of the residence.

Some commentators have disagreed with the broad conclusion that the IRS can force a sale of entireties' property. While that is a reasonable interpretation of the Craft opinion, a more narrow reading is possible based on the facts in Craft. In that case, the Crafts committed two acts that could be perceived as voluntary attempts to break the tenancy by entirety. First, they joined in a transfer to the wife in an apparent attempt to avoid the tax lien. Second, they then sold the property and converted the real estate into cash. Under those circumstances, the Court held that

the husband's portion of the cash proceeds was available to the IRS. The Court did not have to decide whether the IRS could have forced a sale of the residence if the entireties' ownership had remained intact.

50% Value

On the other hand, Judge Sigmund disagreed with the IRS' calculation of value. The parties agreed that the residence had a fair market value of \$250,000. The mortgage was \$148,479. With equity of \$101,520, the IRS claims that a value of \$50,720 should be attributed to its claim. While the math does not quite support this, the IRS maintained that the husband's interest should be valued at 50% of the value of the equity in the residence. Sigmund rejected this approach because the IRS failed to account for the actuarial differences in the life expectancy of the husband and wife that should be used in determining the value of the respective survivorship interests.

In this case, the husband was 46 years old, while his wife was 45. The life expectancy in 2000 under standard U.S. life tables for a male of that age was 31.3 years, as compared to 37.3 years for females. Since the wife was one year younger, she had more than an additional six-year life span over her husband. Therefore, her survivorship interest should have a greater value than the husband's. While Sigmund did not actually determine the appropriate adjustment to the IRS' evaluation based on this factor, she made it clear that when that factor is applied, the husband's interest in the residence would be less than the 50% factor urged by the IRS.

Other Factors

In this decision, Sigmund held that the valuation of a spouse's interest in a tenancy by the entirety should be determined by the applicable joint-life mortality tables. This is an issue that has troubled several commentators since the Craft decision.

In reaching this decision, she did not analyze other factors that might become relevant in future cases, such as the health of the husband and wife, the likelihood of an imminent sale of the property or divorce, which could break up the tenancy by the entirety. Of course, these factors would bring into play calculations that would make the valuation infinitely more complicated. However, if a husband, under the circumstances of the Basher case was dying of a terminable

disease and or expected to live the out the year, it would not be difficult top see how a Court could be persuaded to abandon reliance on standardized mortality tables.

As an aside, one of the messages in the Basher legal opinion that may prove to be somewhat discomfoting to a 46-year old husbands who read it, is that under normal circumstances, their wife of the same age are expected to outlive them by six years.

We would like to thank Harris Ominsky of Blank Rome in Philadelphia for calling this case to our attention. His analysis and commentary is printed in full. The article first appeared in *The Legal Intelligencer* June 23, 2003. There was a recent discussion of a similar nature conducted on DIRT on or about July 11 through 14, 2003.

Bankruptcy; Time to Appeal Judgment; Bankruptcy Code § 108(b)

In a case of first impression the 2nd Circuit Court of Appeals has held that the U.S. Bankruptcy Code extends a judgment debtor's time to appeal a Judgment entered against it prior to the bankruptcy filing. *Local Union No. 38 v. Custom Air Systems, Inc.*, No. 03-7105.

A New York Federal Court granted Summary Judgment to the union local in its dispute with Custom Air. On the day the Judgment was entered, Custom Air filed for Chapter 11 relief. More than 30 days later, Custom Air filed its Notice of Appeal from the Summary Judgment. The union moved to dismiss the Appeal as untimely under Federal Rules of Appellate Procedure 4(a), which sets a 30-day deadline. Custom Air argued that Bankruptcy Code § 108(b) extended the deadline, which section gives a Trustee in Bankruptcy up to 60 days to file a pleading, demand or notice or to perform a similar act, as long as the bankruptcy petition was filed within the timeframe that would otherwise apply to the non-bankruptcy filing. Holding that the filing of a Notice of Appeal would be one of the acts contemplated by § 108(b), the Court held that the Appeal is timely filed if the 30-day time period has not expired before the filing of a Bankruptcy Petition and the Notice of Appeal is filed no more than 60 days after the Order appealed from.

Corporations; Corporate-veil piercing is same as reverse-piercing; Unity of interest & Ownership

The Virginia Supreme Court has recognized a claim for reverse piercing of a corporate veil in a case where a creditor had obtained a judgment against an individual and sought to satisfy that judgment by reaching assets from the individual's interest in a limited partnership. *C.F. Trust v. First Flight Limited Partnership*, No. -022212.

According to the Court, Judgment debtor Barrie Peterson held interests in both a corporation and a limited partnership which paid many of his personal expenses, while he held himself out to be unable to satisfy his creditors' \$6 million Judgment. When the creditors moved against the partnership, a Virginia Federal Court ruled that the creditors had established the grounds for "outsider reverse piercing" of the corporate veil to satisfy the Judgment against Peterson using partnership assets. The partnership appealed and the 4th Circuit certified its questions to the State Supreme Court.

The Va. Supreme Court said that there was no logical distinction between piercing and reverse-piercing and that both should only occur in extraordinary circumstances where the unity of interest and ownership “*is such that the separate personalities of the corporation and the individual no longer exist and to adhere to that separateness would work an injustice.*”

Corporations; Corporate Assets; Line of Credit is an asset; Garnishment

The 8th Circuit Court of Appeals has held that a Company’s bank account line of credit is an asset and the bank made false statements in claiming that the debtor-depositor had no funds in the account. *In re Southwestern Glass Co., Inc.*, No. 02-2565.

Southwestern Glass opened a checking account at the Bank of Arkansas. The account was tied to a credit line providing overdraft protection if Southwestern issued a check in excess of the amount of money on deposit. When a creditor of Southwestern served Writs of Garnishment upon the Bank, the Bank replied that Southwestern had some funds in its checking account but failed to disclose the existence of the credit line. When Southwestern filed for Bankruptcy, the creditor contested the Bank’s answers to the Writ. The Bankruptcy Court found the Bank liable for the full amount of the Judgment. An Arkansas Federal Court affirmed in finding that a Writ of Garnishment applied to proceeds transferred into a credit line supported account,

Upholding the District Court ruling, the 8th Circuit explained, “the proceeds from [the company’s] line of credit transferred into the loan manager account became money or credits belonging to [the company] for the brief period of time between the transfer of the proceeds to the account and disbursement of the proceeds to the payee.”

Divorce; Family Law; Assets; Goodwill is not divisible asset in divorce action

In a case of first impression, the Mississippi Supreme Court held that goodwill may not be incorporated into the business valuation of a dental practice for consideration in determining equitable distribution of property in a divorce action. *Singley v. Singley*, No. 1999-CT-00754-SCT.

After 23 years of marriage, a husband was granted a divorce on the grounds of uncondoned adultery after his wife admitted to having several affairs. He appealed the Court’s decision regarding the valuation of his dental practice. The Court of Appeals affirmed, holding that goodwill could be included in the practice valuation.

Reversing the lower Court’s decision, the Supreme Court explained that goodwill is not property and cannot be divided in a divorce action because of the inherent difficulty in determining the fair market value of such a nebulous asset.

Insurance Law; The Terrorism Risk Insurance Act of 2002

A concise preliminary discussion of this act may be found on the Title Law Associates web site located at www.titlelawannotated.com . Click on the Title Counsel Agenda link and proceed to the title counsel agenda section included in the Fall 2002 issue of the former *Title Law Associates Newsletter*. Item 3 (F) of the ALTA Government Affairs Report discusses Terrorism Insurance. Now 2 attorneys in the insurance and reinsurance practice group of the New York

office of Edwards and Angell, namely John P. Dearie and Laurie A. Kamaika, have suggested that the future of the program is uncertain. They have prepared an excellent article addressing some of the problems with the existing legislation. It appears in the Monday, July 21, 2003 issue of THE NATIONAL LAW JOURNAL at page 17. Mr. Dearie may be contacted at jdearie@edwardsangell.com . Ms. Kamaiko may be contacted at lkamaiko@edwardsangel.com .

NAMES IN THE NEWS

Margaret Mucha McDonnell, President & Chief Operating Officer of 1031 Corp., an affiliate of Title Alliance, and Susan S. Umstead, Vice President of Administration, have been awarded the CES Designation offered through the Federation of Exchange Accommodators, Inc. (FEA).

The Federation of Exchange Accommodators, Inc. (FEA) is the Nations largest trade organization comprised primarily of professional tax-deferred exchange accommodators that specialize in aiding property owners defer capital gains tax through an Internal Revenue Code Section 1031 (IRC §1031) exchange. With over 250 member companies that are located in every state, the FEA has served its members for over a decade as governmental advocate and liaison, educational resource, and ethics administrator.

The FEA established the voluntary CES Certification & Continuing Education Program to enhance the professionalism and expertise of its exchange industry members. Over five years of research and planning went into the development and design of the CES certification program. A successful CES designee possesses a certification that demonstrates to his/her clients and professional advisors that he/she has attained a nationally recognized professional standard of knowledge in the exchange facilitation field.

A CES designation demonstrates to a property owner considering an exchange that the professional they have chosen possesses a certain level of experience and knowledge that meets professional standards. Just as when one selects an attorney, accountant, or REALTOR®, it's important to review the credentials of any professional advisor prior to beginning a business relationship. An exchange professional bearing the CES designation has demonstrated the high level knowledge necessary in dealing with complex tax deferred exchanges.

The FEA administered its first examination in Washington DC on May 15, 2003 covering an array of exchange-related topics designed to challenge the candidates knowledge of exchange rules and also their competency in performing the necessary daily activities of an exchange accommodator company. It also focuses on those ethical issues present when any third party controls the funds of another.

As a CES Designee, one is bound by the Code of Ethics of the FEA and is required to maintain twenty (20) hours of continuing education within a two (2) year period.

The address of 1031Corp., Inc. is 1200 East High Street, Suite 217, Pottstown, Pa. 19464; 800.828.1031.