Title Management Today

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

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Case Law Agenda appear following the Select Court Decisions & Commentary beginning on page 22. NB Circumstances dictate the extent to which lengthy commentary is provided. In this instance we have chosen to report only on those cases we find to be the most significant of those discussed at ALTA Title Counsel. This is in part due to the change in ownership and in part due to the length of this issue. In some cases we have referred the reader to other respected parties with the title industry. This is not our usual practice.

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EDITOR'S DESK

Where from time to time the editor rants and raves about the plundering of the polar star rule.

This publication is entitled *Title Management Today* and yet, oddly enough, there has not been much printed public discussion on how title management has changed over the past twenty years or, for that matter, where as an industry we are headed. Eight years ago Nelson R. Lipshutz, Ph.D., founder and president of Regulatory Research Corporation and a frequent consultant to the ALTA, prepared two articles for the ALTA *Title News* that were published in 1995. The Articles were revised in 1999 and entitled *"Title Insurance 2000 – What's Going on Here?"* Therein he presented a picture of two radically different futures produced by exactly the same forces, the difference being in the title industries responses to those events, particularly new technology. These articles may now be found on the internet web site of Fountainhead Information Systems, Inc., located at www.titleweb.com . I would encourage those of you who have not read these articles to do so and consider whether or not the need for speed has come at the expense of due diligence and accuracy.

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Current Developments

Larry Kirwin discusses the Title Industry Economic Overview For the Year 2002.

Although the economic environment in America was, at best, mixed in 2002, the title insurance industry had another incredible year. We thought that 2001 set a breathtaking pace for the industry, but performance in 2002 shattered all the records. Interim reports from the listed companies suggested that their title insurer subsidiaries were doing well but not until we tallied up eight-four Form 9s did we realize the extent of the tremendous performance. The title insurers reported on here topped all previous revenue records reaching $12.7 billion, a full 30.1% increase over the previous record set with the $9.7 billion in 2001! Revenue performance in 2001 was 24.4% above the $7.8 billion reported in 2000. The industry has moved a long way in two years.

In some jurisdictions, the year-to-year comparisons were again breathtaking. ("Jurisdictions" includes all 50 states, the District of Columbia, Canada, Puerto Rico, the Virgin Islands, Guam, American Samoa and "Other"). California, already the state that consistently yields the highest revenues for title insurers, saw premiums written jump 35.2%, that's an increase of $664 million! That ***increase*** is more than 54 of the 57 jurisdictions produce in ***total*** premiums. On the average for all jurisdictions direct premiums written increased 31.4% with Puerto Rico leading the increase list with a terrific 88.2% gain. Of the States, little Iowa increased 71.8%.

That's not all the good news! For the second year in a row, operating expenses as a percentage of total operating income, were down and hence the operating margins were up; the loss

ratio was down and hence the combined ratio was down; net investment gains, as might be expected, were down —but only modestly (from 3.70% of total operating income to 3.46%); cash generation was way up; net income was up and even after the payment of $411 million in dividends policyholder surplus increased by $563 million.

On top of all that, the first quarter of 2003 has continued to show tremendous improvement. The publicly held title insurance holding companies have reported revenue gains averaging about 30% and record gains in net income — and

mortgage rates continue to fall! Freddie Mac reports that the 30-year fixed mortgage interest rate has dropped month-by-month from 7.0% and 0.6 points in January 2002 to 5.75% and 0.6 points at the end of March 2003. In only one month out of those fifteen has an increase been reported, from 6.09% to 6.11% in October 2002.

The increase in 2002's total operating revenues was coupled with a small increase in agent retention, from 82.0% of agent premiums in 2001 to 82.6% in 2002. The agents retained $8.54 billion in 2002 v. $6.4 billion in 2001.

Consolidated investment gains totaled $439 million or 5.29% of total assets. In 2002 investment gains were $480 million or 8.2% of assets.

The "bottom line," consolidated net income, was $675 million in 2002 as compared with $561 million in 2001, and well above 2000's $257 million.

In 2002 there were a variety of changes in the industry's strength and security. (Readers should note that aggregates are truly hypothetical and that company-by-company results are the vital issue.)

In 2002, the big Fidelity family captured the largest portion of total operating revenue and net premiums written, 30.12% and 29.28% respectively, well ahead of the First American family which took second position with 22.53% and 22.47 respectively. The LandAmerica family was third with 18.40% and 18.11% respectively.

On a family basis, Investors again led the industry by far with operating profits before title losses equal to 18.74% of total operating income. The second position went to the LandAmerica family at 10.38% followed closely by the Fidelity family with 10.29% and Old Republic 8.31%. The greatest year-to-year improvement in this very important category was from LandAmerica which gained 2.24 percentage points; Stewart gained 1.57 points. The average for all forty-one independent companies advanced 1.80 points. Of course on a dollar basis in 2001, Fidelity's $393 million in operating profits was well ahead of all companies.

Aggregate policyholder surplus, after consolidation eliminations, stood at $2.74 billion at 2002 year-end as compared with $2.26 billion at the end of 2001. That's a fine 20.7% increase. The Fidelity family's aggregate policyholder surplus, $1.166 billion, was the highest of the nine groups compared. First American was second at $772 million. The aggregate policyholder surplus for the 43 independents was $292 million, up only $4.0 million from 2001. The eight families' policyholder surplus accounted for 91.25% of the industry aggregate.

The composite balance sheet for the industry became even stronger in 2002. Assets now total $7.77 billion. The dollar value of bonds and stocks (excluding affiliates) was slightly higher ($3.824 v. $3.250) while cash and short-term investments increased to $1.604 billion from $1.308 billion. The value of stocks of related companies was up as was the value of real estate occupied by the company. Receivables from related companies decreased for the second year, from $252 million in 2001 to $237 million at the end of 2002.

On the liabilities side, the known claims reserve was up again to $513 million from $428 million in 2001. The four reserve categories totaled $3.31 billion v. $2.89 billion in 2001. Excluding reserves, other aggregate industry liabilities, including Chicago T&T's $751 million "customer escrow and trust deposits secured by pledged assets," totaled $1.72 billion v. $1.54 billion in 2001. (Note that no "pledged assets" were so identified among CT&T's assets!).

A comparison between the 2002 composite income statement and the same statement for 2001 (shown in the previous edition of this book) reveals some shifting in the sources of premiums written. In 2001 direct operations accounted for 13.84%, in 2002 – 13.08%. Also in 2001, non-affiliated agencies provided 53.3% but in 2002 they provided 55.5%. Affiliated agents became less productive. They provided 26.65% in 2001 but this decreased to 25.97% in 2002.

In 2002, operating expenses for the industry totaled 74.3% of net operating revenue (total operating income less agent retention). In 2001 expenses had consumed 78.9%.

Title losses totaled $582 million in 2002 up 25.2% from $465 in 2001. In fact, increases in losses have occurred annually in 1999, 2000 and 2001 as well (see Ratio C1). Losses incurred were highest as a percent of direct premiums written in direct operations at 9.2% as compared with non-affiliated agents at 5.29% and 1.9% from affiliated agents.

After paying Federal taxes of $243.6 million (up almost 52% from $160.6 million in 2001), the industry showed statutory net income of $675.4 million v. $561.1 in 2001 and $257 million in 2000. Surprisingly, 2002's net income equaled 5.33% of total operating income while the same measurement showed 5.77% in 2001.

Policyholder surplus (after consolidation eliminations) increased by $473.1 million in 2002 v. $387.2 million in 2001. Adjustments to policyholder surplus in 2002 included $411 million for dividends v. $271 million dividends in 2001.

Premiums written increased in 55 jurisdictions and declined in only one. Only the "Other" category saw a decline. California continued to lead the states in the volume of premiums written with $2.551 billion.

The ten states with the largest volume of premiums written accounted for 67.8% of all the premiums written in the 56 jurisdictions v. 68.1% in 2001.

Overall, premiums written were up 31.36% while in 2001 the average state's premiums written advanced 25.27% over 2000. Thirty-one of the jurisdictions showed change greater than the average 31.36% increase. Twenty-five jurisdictions reported change lower than the 31.36% average increase.

As compared with 2001, direct losses paid (as reported in Schedule T) increased 20.1% to $478 million from $396 million. California led the way with the highest dollar losses followed by the other two leading states: Florida and Illinois. New York was fourth. Five jurisdictions reported double-digit loss-to-premium ratios. Overall, the loss-to-premium ratio was 4.0% down from 4.3% in 2001.

Market share by state is shown in Section Four. We realize this portion of the book is of vital interest to many readers.

Section Five contains Demotech's Title Insurance Financial Stability Ratings© and their Commercial Real Estate Recommendations/Reinsurance. This is new this year and we trust our readers are familiar with Demotech's analysis. The materials' presentation in this book provides Demotech's subscribers a hard copy of material otherwise available at their website.

Most of the forty-seven ratios shown in Section Six compare the aggregate and median performances with the "ten largest" companies. In all cases those are the ten companies with the highest amount of total operating income.

Ed. Note: A much more detailed analysis of the title insurance industry's economic profile may be obtained from the 2003 Edition of *CDS Performance Report*. In addition to the market share information and corporate family comparisons, the review contains comparative profit and loss statements and balance sheets for each company and a comprehensive parent-subsidiary cross-reference. To purchase a copy of *"CDS Performance of Title Insurance Companies",* 2003 Edition, contact Larry Kirwin at Corporate Development Services, Inc. The toll free phone number is 800.296.1540. Mr. Kirwin's e-mail address is lekirwin@aol.com His web site address is www.CDFwebCentral.com . Fitch Ratings and A.M. Best also published Reports on Title Insurers 2002 results. Those sources of Market Trends and highlights may be found at the following respective web sites located at www.fitchratings.com and www.ambest.com . Standard & Poor's Ratings Service release its report card on the U.S. mortgage and title insurance industry on May 1, 2003. The full report may be found on S&P's Web-based credit analysis system located at www.ratingsdirect.com . An overview may be found on www.titleweb.com .

Joyce Palomar discusses Limited Liability Companies. Excerpt From Patton & Palomar on Land Titles, 3rd ed., Chapter 8

§ 404. Limited Liability Companies

The different states' limited liability company (hereinafter LLC) statutes have many variations but do contain common elements. Most acts provide that: (i) members are not personally liable for the debts or obligations of the LLC; (ii) the LLC's only public filing is a brief charter document, entitled Articles of Organization, which contains minimal information; (iii) the document governing the operation and management of the LLC is an unfiled Operating Agreement, comparable to a partnership agreement; (iv) the LLC is managed by its members[1] or, in some states, by a manager or managers who need not be members; (v) death, bankruptcy, or withdrawal of a member normally terminates the LLC, unless all the remaining members consent to continue the business,

[1] Under state acts, LLC owners are called either "members" or "transferees."

and (vi) LLC interests may not be transferred without the consent of other members.[2]

Because the limited liability company is still a relatively new type of business organization in the United States, it is not yet certain how courts will decide questions concerning an LLC's title to real property. Courts may try to answer questions that arise by analogizing to corporations or partnerships. Because LLCs have features in common with both partnerships and corporations, the same kinds of title concerns may be raised.[3] As with a partnership, membership in an LLC is not freely transferable and the organization may terminate if a member dies, withdraws or becomes insolvent. Also, depending on the LLC's Articles of Organization or Operating Agreement, either the members may manage its business or they may appoint managers who may or may not be members of the LLC.[4] As with a limited partnership or corporation, the LLC constitutes an entity separate from its members. If analogy to corporate and partnership law would produce different answers to a particular question, it is unclear which will be the correct reference for LLCs in a particular case or whether yet a third result is proper.[5]

The issues are complicated in multi-state transactions by the fact that the law of the state in which the land is located is the law that governs transfers of that land, not the law of the state in which the land-owning LLC was organized.

When an LLC is merely a link one or more transactions back in the chain of title, the title examiner may rely somewhat both on the record and on several presumptions. The next section of this chapter sets forth presumptions on which the title examiner commonly may rely. The sections following consider additional requirements an attorney likely will impose when closing a transaction in which an LLC is grantor or grantee, in order to secure the enforceability of the title transfer.

§ 405. -- Conveyances in which an LLC is a Prior Link in Chain of Title

When an LLC is merely a link one or more transactions back in the chain of title, the title examiner may rely somewhat on state law which presumes the validity of recitals in recorded and acknowledged instruments.[6] Many states permit reliance on the acknowledgement in a recorded instrument and a presumption that the person who purported to execute it as manager of an LLC, in fact, was a manager of the company.[7] In these states, so long as a recorded deed was executed by a person as manager of the LLC and acknowledged, a title attorney will not need to require any separate certification from all the members that the person who signed the deed actually was the LLC's manager.

This presumption is consistent with the intention of many state legislatures to shield the internal operation of LLCs from public view, as evidenced by their not requiring (a) any public filing other than the LLC's Articles of Organization or (b) a listing in the Articles of names of all the LLC's members or managers. This presumption also is consistent with state statutes that grant a *prima facie* presumption of genuineness and authenticity to properly acknowledged instruments. Finally, the presumption is consistent with title standards for partnerships and corporations which do not require the title examiner to search outside the public records to prove the

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[2] Landers and Worrell, *Uses of the Limited Liability Company in Real Estate Law,* Title News 18 (Fall 1993).

[3] Some state statutes may suggest the analogy to be used to decide issues regarding LLC ownership or management of real property. For example, Pennsylvania's LLC Act expressly provides that if the certificate of organization states that "management of the company is vested in a manager or managers" (as permitted by § 8913(5)), then, to the extent not superseded by any provision of the Limited Liability Company Act, the provisions of Uniform Limited partnership Act govern the LLC. 15 Pa. Cons. Stat. Ann § 8904(a)(2) (1994). If an LLC's certificate of organization does not state that management of the company is vested in a manager or managers, then the LLC is treated as a form of general partnership, and, to the extent not inconsistent with the Limited Liability Company Act, the provisions of the Uniform Partnership Act govern. 15 Pa. Cons. Stat. Ann. § 8904(a)(I) (1994). Email from William C. Hart dated 2/21/2003, to Prof. Joyce Palomar. Mr. Hart's biography may be found in the Preface to this book.

See earlier sections of this chapter considering partnerships and corporations.

[4] Jack Levey, *Title Insurance and the Limited Liability Company*, in ABA Real Prop. Prob. & Tr. L. Sec., Real Property Programs Vol. 2, J-149 (May 1994).

[5] Landers and Worrell, *Uses of the Limited Liability Company in Real Estate Law*, Title News 21 (Fall 1993).

[6] *See* Ch. 7, § 361 of this treatise.

[7] *See e.g.,* Conn. Title Examination Standard 21A.1, *Conveyance to and From Limited Liability Companies in the Chain of Title.*

Kan. Title Standard 4.6.

Louisiana Uniform Title Standards, Art. X, Standard 10.1.

N.H. Bar Ass'n Title Examination Standards, Art. VIII, 8-2.

Okla. Bar Ass'n, Title Examination Standard 25.2.

Vermont Title Standards, Standard 22.1 *Conveyances to and from Limited Liability Companies in the Chain of Title.*

identity of partners and corporate officers who executed recorded instruments.

A second presumption permits a title examiner to presume that a manager who executed a recorded instrument on behalf of an LLC had the authority to bind the company.[8] A Texas Title Examination Standard goes a little farther and would permit a title examiner to presume that a recorded instrument executed by an "officer, agent, manager, or member" of an LLC binds the company so long as the conveyance appears to be consistent with the LLC's usual way of doing business.[9] The Texas Standard would resolve a concern that has arisen, *i.e.,* the acceptability of instruments executed by the 'president" of an LLC when state statutes provide for execution of contracts and instruments of conveyance by an LLC's manager/s.[10] Of course, a title examiner may not rely on either a manager or officer's apparent authority if the examiner had knowledge of facts indicating lack of authority.

The presumption of authority also may be limited when the real property conveyance does not apparently "carry on the usual business of the LLC." The reason for this limitation is that, if a sale is of substantially all the LLC's property, state statutes require approval by a majority of the LLC's members. It rarely would be possible to know from examining a single deed recorded in the chain of title whether the sale of that parcel of property was part of a sale of substantially all of an LLC's assets. Some title examiners may feel that, unless they can prove the sale was *not* part of a sale of all assets, they should require a certificate of authority signed by a majority of the LLC's members. (See the discussion in this chapter of the need for a certification of manager's authority and a verification that the transfer is not part of a sale of substantially all the LLC's assets when the title attorney is closing a transfer from an LLC.) Yet, for the same reasons that a title examiner can presume that one who executed the deed as manager of an LLC was the manager, the title examiner should be able to rely on the deed's having been acknowledged and recorded to presume that one who executed the deed as manager had authority to convey the property for the LLC. The title examiner should only lose the ability to presume that the manager had the authority to convey the property if the record affirmatively reveals that this was *not* a sale carrying on the usual business of the LLC.

A third presumption permits a title examiner to conclude that, if the recorded instrument was properly acknowledged, the LLC was legally in existence on the date the instrument was executed.[11] This is consistent with most states' title examination standards for corporations, which generally do not require proof that a corporation in the chain of title properly filed a certificate of incorporation. This presumption also avoids the need for ascertaining as a matter of fact whether an LLC may be undergoing dissolution proceedings. Third parties without notice may rely on an acknowledged and recorded deed even when the LLC is in the process of dissolving and winding up its affairs.[12]

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[8] *See e.g.,* Conn. Title Examination Standard 21A.1, *Conveyance to and From Limited Liability Companies in the Chain of Title*.

La. Title Standard Art. X, Standards 10.5 & 10.7 (if the instrument has been recorded 10 years).

N.H. Bar Ass'n Title Examination Standards, Art. VIII, 8-2.

N. Dak. C. C. §§ 10-19.1-104, 10-32-108 and 47-10-05.1 (1993).

Okla. Bar Ass'n, Title Examination Standard 25.3.

S. Dak. C. L. §§ 43-25-21 and 47-34A-301 (1995); and S. Dak. Title Examination Standard 5-31.

Vermont Title Standards, Standard 22.1 *Conveyances to and from Limited Liability Companies in the Chain of Title.*

[9] Tex. Rev. Civ. Stat. art 1528n, art. 2.11, art. 2.21.D (1995); Tex. Title Examination Standard 7.50. *Conveyance Of Real Property Held In Name Of Limited Liability Company*:

> If title is held by a limited liability company, an examiner may rely upon a conveyance that is executed by an officer, agent, manager, or member thereof if the conveyance appears to be consistent with the limited liability company's usual way of doing business.

[10] In contrast to the Texas Standard, Arkansas Title Examination Standard 4.9 provides that if the Articles of Organization provide that management of the LLC is vested in a manager or managers, then any conveyance "must" be executed by a manager; if the Articles do not provide that management of the LLC is vested in a manager/s, then any conveyance may be executed by a member of the LLC.

[11] Conn. Title Examination Standard 21A.1, *Conveyance to and From Limited Liability Companies in the Chain of Title.*

Louisiana Uniform Title Standards, Art. X, Standard 10.1.

N.H. Bar Ass'n Title Examination Standards, Art. VIII, 8-3.

Oklahoma Bar Ass'n, Title Examination Standard 25.7.

Vermont Title Standards, Standard 22.1 *Conveyances to and from Limited Liability Companies in the Chain of Title.*

[12] Donald Heath, Jr., *Limited Liability Companies in Real Estate Titles: What Requirements Should the Examiner*

A fourth presumption is that a foreign LLC is deemed to have been both lawfully created and registered to do business in the state where the real property is located.[13] More specifically, so long as a recorded instrument has been executed and acknowledged by a foreign LLC, the title examiner may presume both that the company was properly organized in its state or country of origin and that it was properly registered to do business in the state where the instrument was executed and the real property situated. A similar presumption in many states' title examination standards exists for foreign corporations.[14]

Members and managers have no rights individually in a property interest that is vested in an LLC.[15] Therefore, the spouse of a member or manager cannot have marital rights in property owned by the LLC.[16] Also, assets of an LLC are not subject to execution for debts of its managers or members.[17]

§ 406. – Conveyances in which LLC is transferee.

When an LLC is to be the transferee of real estate, an attorney or title officer must assure that title will vest in the LLC. To acquire and hold title to real estate, an LLC must have legal existence. To verify legal existence, in some states, one may obtain a certificate of good standing from the Secretary of State. Where such a certification is not available, one may require a file-stamped copy of the LLC's Articles of Organization, along with all amendments. The LLC also must have complied with other formalities in organizing and filing that are required by the law of the state in which the LLC is organized.

In most states, LLCs are subject to dissolution upon the death, bankruptcy, in competency, insolvency or withdrawal of a member.[18] Dissolution does not have to occur if all the remaining members vote to continue the company.[19] The withdrawal of a member may similarly cause the dissolution of an LLC. The attorney or title officer will want to verify that no certificate or decree of dissolution or termination is on file.

An attorney also must ascertain that statutes in the state where the land is situated recognize LLCs as capable of holding title to real property. When a foreign LLC is purchasing land in another state, the attorney needs to verify that the foreign LLC has complied with registration or qualification requirements of the state where the land is situated.

Nevertheless, if courts construe LLC laws similarly to corporate law, they may recognize a defectively-formed or involuntarily-dissolved LLC as a *de facto* organization that could acquire title to land.[20] This reasoning would permit only the state to raise defects in forming and constituting the company as grounds to question its capacity to acquire title.[21]

§ 407. -- Conveyances in which LLC is transferor.

When an LLC is the transferor of an interest in real estate, an attorney or title officer needs to take steps to reduce the risk of fraud, forgery, or other acts that could result in the voidability of the title being transferred. Presumptions that are

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Make?, 65 Okla. B.J. 1112, 1115 (1994).

[13] Conn. Title Examination Standard 21A.1, *Conveyance to and From Limited Liability Companies in the Chain of Title.*

Okla. Bar Ass'n, Title Examination Standard 25.8.

Vermont Title Standards, Standard 22.1 *Conveyances to and from Limited Liability Companies in the Chain of Title.*

[14] Donald Heath, Jr., *Limited Liability Companies in Real Estate Titles: What Requirements Should the Examiner Make?* 65 Okla. B.J. 1112, 1115, 1116 (1994).

[15] *E.g.* La. Rev. Stat. § 12:1329 (2002); La. Unif. Title Standards, Art. X, Standard 10.4.

Okla. Title Examination Standard 25.5.

The "property of a limited liability company is owned by the company itself rather than nominally, or otherwise, by the members." 15 Pa. Cons. Stat. Ann. § 8923, Comment.

Wis. Stat. § 183.0103 (1995).

[16] *E.g.,* Iowa Code § 490A.901 (2001); Iowa Land Title Standards 15.1.

La. Rev. Stat. § 12:1329 (2002); La. Civ. Code art. 2352; La. Unif. Title Standards, Art. X, Standard 10.4.

Ok. Stat. tit. 18, § 2032 (2003); Oklahoma Title Examination Standard 14.5.

[17] Okla. Title Examination Standard 25.6. This standard is consistent with a title examination standard exempting partnership property from claims by creditors of partners.

[18] Jack Levey, *Title Insurance and the Limited Liability Company*, ABA Real Prop. Prob. & Tr. L. Sec., 1994 Real Property Programs, Vol. 2, J-149, J-151 (May 1994).

[19] Ibid.

[20] *See* Vermont Title Standards, Standard 22.1 *Conveyances to and from Limited Liability Companies in the Chain of Title*, Comment 1.

[21] Alan Durbin & Hayden Chapman, *The Oklahoma Limited Liability Company Act: Nascent Real Property Issues*, p. 8 (Okla. Bar Ass'n Real Prop. L. Sec. Seminar, March 1994).

available when a conveyance from an LLC is of record in a chain of title – discussed *supra* at § 405 -- do not generally apply in a present transaction in which an LLC is transferor or transferee.[22] Therefore, to assure that a deed from an LLC was executed with the requisite authority to bind the LLC to the conveyance, an attorney will want answers to the following questions:

(1) Did the LLC legally exist when it acquired the real property and on the date it transferred the property?
(2) Who can execute a deed on behalf of the LLC?
(3) Have the members authorized a sale of substantially all the LLC's property?
(4) Is the transferor a foreign LLC?

The reasons for these questions will be examined next.

(1) Did the LLC legally exist when it acquired the real property and on the date it transferred the property?

An attorney or title officer should confirm that the limited liability company legally existed both when the property was transferred to the LLC and on the date the LLC proposes to transfer the property to the transferee. An LLC is created by filing its Articles of Organization in the appropriate state office, usually the office of the Secretary of State. Most states' LLC statutes do not require the LLC to record its Articles of Organization in the real property records in every county where an LLC owns real property. Thus, a standard title search would show any real property conveyances to the LLC, but reveal no documentation proving that the LLC legally existed when it took title. If available, a certificate of good standing should be obtained from the state where the LLC was organized.[23] If that state does not issue good standing certificates, the title examiner will ask for a file-stamped copy of the LLC's Articles of Organization.[24]

The attorney or title officer will want to ascertain that the LLC complied with any other formalities in organizing and filing that are required by the law of the state in which the LLC is organized. If courts construe LLC laws similarly to corporate law, they may recognize a defectively formed LLC as a *de facto* organization that could pass title to a subsequent grantee.[25] This reasoning would permit only the state to raise defects in forming and constituting the company as grounds to question its capacity to acquire title to land.[26]

In addition to verifying that the LLC was legally created, the title examiner will want to verify its continuing existence as of the date the LLC is to execute a deed or mortgage in favor of a transferee.[27] Most LLC acts have dissolution provisions since, to obtain a favorable tax classification, the LLC needs to avoid the corporate characteristic of continuity of life. As an example, in one state's statute, the LLC is dissolved at:

> (i) The time or the occurrence of events specified in the LLC's Articles of Organization or Operating Agreement;
> (ii) The written consent of all members;
> (iii) An event of dissociation of a member, unless the limited liability company is continued either by the unanimous consent of the remaining members within ninety days following the occurrence of any such event;
> (iv) by a decree of judicial dissolution.[28]

If any of these events has occurred before the proposed transaction is closed, it must be asked what the legal effect is on the LLC's ability to complete the proposed real estate transfer. State law may permit the LLC to continue, despite the event of dissolution, with the consent of all the remaining members.

[22] The Vermont, Texas, Oklahoma and Connecticut title examination standards cited in § 405 all are expressly title *examination* standards, not transactional standards.

[23] *E.g.,* Kan. Stat. § 17-7646(3)(2001); Kansas Title Standard 4.6.

Wis. Stat. § 183.0113 (1995) (certificate of status for an LLC).

[24] *E.g.,* Arkansas Title Examination Standard 4.9 recommends that the examiner should require an LLC's Articles of Organization any time title is dependent upon a conveyance from a LLC executed less than 40 years prior to the examination, which is the period of the state's marketable record title act.

Kansas Title Standard 4.6.

Neb. Real Estate Title Standards, *Limited Liability Company Transactions.*

Wis. Stat. § 183.0103 *et seq.* (1995).

[25] Alan Durbin & C. Hayden Chapman, *The Oklahoma Limited Liability Company Act: Nascent Real Property Issues*, at 8 (Ok. Bar Ass'n Real Prop. Sec. Seminar, Mar. 1994).

[26] Ibid.

[27] This is required by Neb. Real Estate Title Standards, Ch. III, p. 11 *Limited Liability Company Transactions* Oct. 19, 1995).

Wis. Stat. §§ 183.0103, 183.0113 (1995).

[28] Okla. Stat. tit. 18, § 2037 (2003).

See also Wis. Stat. §§ 183.0802 *et seq.* (1995).

Nevertheless, during the period of time between the event of dissolution and any affirmative action taken by the remaining members, the company is dissolved.[29] Regardless, the LLC arguably does not immediately terminate, but, as with partnerships, enters the phase of "winding up."[30] Under this analysis, the occurrence of an event of dissolution would not necessarily terminate executory contracts of the LLC, because the LLC would not actually terminate until winding up has occurred and the assets of the company have been liquidated.[31]

(2) Who can execute an instrument of conveyance on behalf of the LLC?

The attorney or title officer will be concerned about who can properly execute an instrument to convey in interest in real estate owned by an LLC. A preliminary question is whether the particular state LLC act creates a legal person or entity capable of holding title to real property. Generally, the state's LLC act will expressly address whether the LLC is an entity capable of holding title to real property. If the LLC act is silent, then an issue exists as to whether title to the land is held in the LLC as a legal, juristic person or by the individual members. It then would be necessary to resort to common law in order to characterize the LLC as an entity or a general partnership that is capable of holding title to land, or as an unincorporated association, which is not capable of holding title to land in many states.[32] If an LLC under the applicable state act is *not* an entity capable of holding title to real estate, the conveyance to the LLC would have been ineffective to transfer legal title to the LLC.[33] It has been suggested that, in this situation, legal title would remain in the LLC's grantor who would hold title in trust for the members of the LLC.[34] Or, the members of the LLC might be deemed to hold title to the real property collectively.[35]

Where it is clear that an LLC owns real property as an entity, the next question is how to verify the authority of a member or manager to execute an instrument of conveyance on the LLC's behalf. First, one must consider statutory authorizations or restrictions. LLC acts tend to prescribe three different practices. Most provide that management functions are to be conducted by the LLC's members.[36] Where management is reserved to the LLC's members, every member is an agent of the LLC for the purposes of conducting its business. Every member's act then, including the execution of any instrument of conveyance in the LLC's name, binds the LLC so long as the act is for the apparent carrying on of the LLC's business in the usual way, unless the person dealing with the LLC has actual knowledge of the member's lack of authority to act for the LLC in the particular matter.[37] Most states also permit an LLC's members to delegate the authority to conduct the company's business to one or more members or managers.[38] Finally, the state statute itself may designate an officer of the LLC who will sign all conveyances.[39] For example,

[29] Alan Durbin & C. Hayden Chapman, *The Oklahoma Limited Liability Company Act: Nascent Real Property Issues*, at 23 (Ok. Bar Ass'n Real Prop. Sec. Seminar, Mar. 1994).

[30] Ibid. at p. 24.

See e.g, La. Rev. Stat. § 13:1336(A) (1995); La. Unif. Title Standards, Art. X, Standard 10.11.

[31] Alan Durbin & C. Hayden Chapman, *The Oklahoma Limited Liability Company Act: Nascent Real Property Issues*, at 24 (Ok. Bar Ass'n Real Prop. Sec. Seminar, Mar. 1994).

[32] Alan Durbin & C. Hayden Chapman, *The Oklahoma Limited Liability Company Act: Nascent Real Property Issues*" at 9 (Ok. Bar Ass'n Real Prop. L. Sec., Mar. 1994).

[33] Ibid.

[34] Id.

[35] Id.

[36] This decentralizes management for purposes of achieving pass-through tax classification.

[37] Jack Levey, *Title Insurance and the Limited Liability Company*, in ABA Real Prop. Prob. & Tr. L. Sec., Real Property Programs Vol. 2, J-149, J-150 (May 1994), citing Fla. Stat. ch. 608.425 (conveyance by member binding on LLC in which management has been retained by members); Okla. Stat. tit. 18, § 2019; Ohio Rev. Code § 1705.25(A)(1); Nat'l Conference of Commissioners on Uniform State Laws, Uniform Limited Liability Company Act, § 301(a)(2).

[38] *See* Fla. Stat. ch. 608.425 (conveyances by manager binding on LLC) (1995).

See Kan. Stat. § 17-7612 (1996); Kan. Title Standard 4.6.

Ohio Rev. Code §§ 1705.35 & 1705.25(B)(1) (1996).

Okla. Stat. tit 18, § 2019 (2003).

See Nat'l Conference of Commissioners on Uniform State Laws, Uniform Limited Liability Company Act, § 301(b)(3).

Minnesota's LLC Act mandates that conveyances of real property from an LLC are to be executed by its chief manager.[40]

If the state LLC act provides for members to vote in proportion to their capital contributions, it is necessary to establish that this percentage requirement has been met. Similarly, where state law requires decisions of multiple managers to be made by majority vote,[41] and the LLC's articles have delegated management authority to more than one manager, one should verify that this statutory requirement has been met.

In addition to statutory requirements, an LLC's Articles of Organization or Operating Agreement *may* restrict members' authority with respect to transfers of the LLC's real property interests or delegate authority to particular members or managers. The difficulty for the attorney or title officer is finding *written* evidence of delegation of or restriction on members or managers' authority to transfer real property interests on the LLC's behalf. In many states, the LLC's Articles of Organization do not have to indicate whether the members operate the company or have appointed managers. In fact, in many states the LLC's Articles do not even have to identify its members. Also, although the LLC's Operating Agreement controls the LLC's internal organization and may delegate management authority to one or more members or managers, it is not required to be publicly filed. Some states do not even require that the Operating Agreement be in writing.[42]

If the LLC was organized in a state that *does* require its Operating Agreement to be in writing, the attorney or title officer will be able to review the Operating Agreement for specific requirements relating to managers and members' authority to bind the LLC in a real estate transaction. They will look for whether the Operating Agreement sets out (a) the identity and respective voting percentages of the members, (b) any delegation of authority to managers, (c) any specific voting requirements with respect to members or managers' consent to a sale of real property, and (d) any provisions concerning formalities in calling meetings and voting.[43]

If no written Operating Agreement exists, an attorney or title officer will focus, first, on whether all statutory requirements are met for approval of the LLC's sale of real property. The attorney or title officer may ask for written certification executed by all the members which (i) identifies all the LLC's members and managers; (ii) describes the voting procedure and results that authorized the proposed real property transaction; and (iii) permits the grantee to rely on the certificate.[44]

In addition to ascertaining that the party who executes the deed on the LLC's behalf is authorized to do so, an attorney will have to make certain that the name on the deed out from the LLC conforms with the name on the deed in to the LLC. For example, if the deed to the LLC named the grantee as "*XYZ* LLC," in order to divest the company of title a subsequent conveyance must be executed by *XYZ* LLC, acting through an authorized manager or member.[45]

If the deed conveyed land to "*A*, manager of *XYZ* LLC," the title vested in the LLC. The conveyance from the LLC then could be executed either by *A* as manager of *XYZ* LLC or by *B* as manager of *XYZ* LLC.[46] Here it is clear that *A's* creditors and spouse cannot attach the property, since the recorded instrument recites that *A* holds the land in a representative capacity.[47] Members and managers have no rights individually in a property interest that is vested in an LLC.[48] Therefore, the

[39] Jack Levey, *Title Insurance and the Limited Liability Company*, in ABA Real Prop. Prob. & Tr. L. Sec., Real Property Programs Vol. 2, J-149, J-150, J- 150 (May 1994), citing Minn. Stat. § 322B.673 (1993).

See e.g., Wis. Stat. § 183.0702(2) (1995).

[40] Minn. Stat. § 322B.673 (1993).

[41] *See e.g*., Okla. Stat. tit. 18, § 2018 (2003).

[42] Alan Durbin & C. Hayden Chapman, *The Oklahoma Limited Liability Company Act: Nascent Real Property Issues*, at 13-14 (Ok. Bar Ass’n Real Prop. L. Sec., Mar. 1994).

[43] Ibid. at p. 17.

See requirement in Neb. Real Estate Title Standards, Ch. III, p. 11 *Limited Liability Company Transactions* Oct. 19, 1995).

[44] *See e.g.,* La. Rev. Stat. § 12:1305(C)(5) & 12:1317(C) (1996); La. Unif. Title Standards, Art. X, Standard 10.6 Evidence of Agent Authority.

[45] Okla. Title Examination Standard 25.4.

[46] Ibid.

[47] Id.

[48] *E.g.* La. Rev. Stat. § 12:1329 (1996); La. Unif. Title Standards, Art. X, Standard 10.4.

spouse of a member or manager cannot have marital rights in property owned by the LLC.[49] Also, assets of an LLC are not subject to execution for debts of its managers or members.[50]

What if the land was conveyed to "*A*, manager" or "*A*, member," with no reference to the LLC? To transfer the title, a subsequent conveyance must be executed by *A* in the same capacity, as manager or member. A conveyance by *B* as manager of *XYZ* LLC will not transfer title.[51] If *A* is dead, the title company will need to obtain a deed from *A's* personal representative or heirs.[52] It is unclear whether *A's* creditors and spouse could make a claim to the land.[53]

What if the deed conveyed the land "to *A*"? Even if *A* used *XYZ* LLC's money to purchase the land, *A* has a fee simple title as far as third parties without notice are concerned. A spouse would have to join on the deed out to clear the record of possible homestead claims.[54] Creditors of *A* could attach the property. In this situation, the LLC may recover the property from the manager, *A*. Nevertheless, third party purchasers from *A* would be entitled to rely upon the record, so long as they did not have actual notice of the LLC's claims.[55]

(3) Have the members authorized a sale of substantially all the LLC'S property?

Okla. Title Examination Standard 25.5.

[49] *E.g.,* Iowa Code § 490A.901 (1996); Iowa Land Title Standards 15.1.

La. Rev. Stat. § 12:1329; La. Civ. Code art. 2352 (1996); La. Unif. Title Standards, Art. X, Standard 10.4.

Ok. Stat. tit. 18, § 2032 (2003); Oklahoma Title Examination Standard 14.5.

[50] Okla. Title Examination Standard 25.6. This standard is consistent with a title examination standard exempting partnership property from claims by creditors of partners.

[51] Donald Heath, Jr., *Limited Liability Companies in Real Estate Titles: What Requirements Should the Examiner Make?*, 65 Okla. B.J. 1112, 1115 (Mar. 26, 1994).

[52] Ibid.

[53] Id.

[54] Id.

[55] Id., and *supra* Ch. 8, § 405.

Another concern is whether the real property transaction is in the ordinary course of the LLC's business.[56] Many state LLC acts vest a manager or single member with apparent authority to execute a conveyance of company property only so long as the conveyance apparently carries on the company's business in the usual way. Conversely, if the sale is of all or substantially all of the LLC's assets, the state LLC act may require a majority vote of the members.[57] In the latter case, the state act and the LLC's Articles of Organization and Operating Agreement all must be checked to determine whether the members' votes are to be in proportion to their capital contributions or whether other voting requirements exist, such as an extraordinary majority.[58] Since a manager or single member could not bind the LLC in this situation without the requisite approval, the attorney will want evidence that either a majority of members have approved the insured transaction or the insured transaction is not of substantially all of the LLC's assets.[59] While written certifications discussed earlier in this section can satisfy the question of members or managers' authority to execute a deed on behalf of the LLC, this assumes that there are not undisclosed members who failed to sign the certificate. Such an undisclosed, non-consenting member might be able to recover title to the land for the LLC by proving that the sale was not "in the usual business" of the LLC.[60]

This aspect of most state LLC Acts is similar to language in the Uniform Partnership Act. Therefore, case law construing this portion of the Uniform Partnership Act may be applied by analogy. Courts have held that if a sale of partnership property is not the "apparent carrying on in the usual way the business of the partnership," a selling partner does not bind the partnership without written authority from the other members.[61] For this reason, a partner does not have authority to convey the sole property of the firm or partnership property that is not held for the purposes of sale.[62] The

[56] *See* Kan. Stat. § 17-7612 (1996); Kan. Title Examination Standard 4.6.

[57] *See* Alan Durbin & C. Hayden Chapman, *The Oklahoma Limited Liability Company Act: Nascent Real Property Issues*, at 19 to 22 (Ok. Bar Ass'n Real Prop. Sec. Seminar, Mar. 1994).

[58] Ibid.

[59] *See* Kan. Stat. § 17-7614(d) (1996); Kan. Title Examination Standard 4.6.

[60] *See* Alan Durbin & C. Hayden Chapman, *The Oklahoma Limited Liability Company Act: Nascent Real Property Issues*, at 19 to 22 (Ok. Bar Ass'n Real Prop. Sec. Seminar, Mar. 1994).

[61] Id. at 20 – 21.

partnership may recover such property unless the grantee has subsequently conveyed to a bona fide purchaser for value with no knowledge that the partner's act exceeded the partner's authority.[63]

(4) Is the transferor a foreign LLC?

A fourth concern exists when the transferor is a foreign LLC. Then, in addition to the requirements discussed in prior paragraphs of this section, the attorney or title officer will want to determine whether the LLC Act of the state where the real property is located requires the foreign LLC to have registered or otherwise qualified to do business in the state. In many states, the failure to be registered or qualified to do business in the state where the land is located would not invalidate a real property transfer.[64]

In sum, when an LLC is the transferor of real property, an attorney or title officer may make a number of requirements to lessen the risk that title transferred may be voidable. Such requirements may include one or more of the following:

A). Evidence of due organization, existence and qualification.
(1) a certificate of good standing, where available.
(2) a copy of the LLC's Articles of Organization and all amendments thereto, bearing the filing stamp of the Secretary of State.
(3) a copy of a duly executed Operating Agreement (with all amendments thereto) which identifies all members and their voting percentages.
(4) proof of qualification as a foreign LLC.
(5) ascertaining that no certificate or decree of dissolution has been filed or, if a certificate has been filed, that the person acting on the LLC's behalf is authorized to wind up the LLC's affairs.
(6) ascertaining that no certificate or decree of termination is on file.

B). Evidence of authorization for the real property transfer.
(1) ascertaining that the transfer is apparently in the ordinary course of business.
(2) obtaining approval of all members if the transfer is of substantially all assets or some other action that may make it impossible for the LLC to continue.
(3) a copy of the operating agreement or any other instrument vesting authority in one or more members or appointing a manager or managers.
(4) verifying statutory authority for the LLC to own and transfer real estate and for the transfer to be carried out by the person purporting to have authority to do so.
(5) a written instrument signed by the LLC's members which evidences consent to the proposed insured transaction (by the percentage required under the Operating Agreement), containing specific authorizations for designated members or managers of the LLC to execute all documents and perform those actions necessary to consummate the proposed insured transaction.[65]

[62] Id.

[63] Id.

[64] *See e.g.,* Iowa Code § 490A.1407(2)(i) (1997); Iowa Land Title Standard 15.2.

[65] *See* Jack Levey, *Title Insurance and the Limited Liability Company*, in ABA Real Prop. Prob. & Tr. L. Sec., Real Property Programs Vol. 2, J-149, J- 152-153 (May 1994).

Executive Committee of the Uniform Laws Conference considers recommendation of Joint Editorial Board on Real Property Acts with regard to the approval of a Uniform Mortgage Satisfaction Act.

At the recent meeting of the Joint Editorial Board on Real Property Acts ("JEBRPA") in Chicago concerning the proposed Uniform Mortgage Satisfaction Act, the Executive Committee of the Uniform Laws Conference chose to approve the recommendation.

The Drafting Committee considered what some might view as a radical step in satisfying a recorded mortgage. Basically, it discussed a statutory authorization – perhaps in the form of a default rule – that would allow the title insurance company for the 'new' buyer' / ' new' lender (or the closing escrow agent, settlement agent or buyers' attorney – all open items) to record a binding release of the seller's 'old' mortgage upon tender to the 'old' lender of the amount designated in the 'old' lender's payoff letter. As a consequence, the 'old' mortgage would be legally released without the need for the 'old' lender to ever physically deliver a release.

The recommendation comes as a consequence of modern residential real estate transactions and the phenomenal growth of the secondary market; releases are rarely present at the

closing. Instead, the 'new' lender's title insurance company universally insures over the 'old' mortgage in order to satisfy the 'new' lender's requirement that it hold a valid first lien on the buyer's house. The title company, in turn relies in large measure on the validity of the 'old' lender's faxed payoff letter. New Jersey and Pennsylvania already have similar legislation on the books. Title agents and lenders both express cautious optimism that such a uniform law would address the frustration experienced in the closing process with regard to antiquated mortgage cancellation, satisfaction and release mechanisms. Ed. Note: More on this later.

RESPA DEVELOPMENTS

Issue: In response to lender group proposals to "simplify" and reform RESPA (i.e., relief from liability of RESPA and TILA) HUD has proposed an exemption from Section 8 of RESPA. The exemption would allow lenders to "package" settlement services and to obtain volume discounts, including discounted title and escrow rates for volume purchasers, from the settlement service providers in the package as long as the total price of the group of packaged settlement services was guaranteed to the consumer.

Background: RESPA and TILA are consumer protection statutes that were enacted over 25 years ago to provide home buyers information on, respectively, residential real estate closing costs and credit terms. Because the real estate industry delivery system and consumers' sophistication have changed, these statues no longer work effectively. Many lenders and the consumer groups argue that RESPA and TILA should be simplified, that a combined disclosure for RESPA and TILA should be developed and that a new exemption to Section 8 to allow internal discounts of "packaged" and guaranteed settlement services should be allowed.

Editors Comment: In light of the *Lane* decision (see case commentary at Exhibit 71) there already appears to be case law in support of such legislative changes.

Policy: In October 2001, ALTA modified its policy position on RESPA as follows:

> ALTA supports settlement services legislation or regulations that promote consumer choice and empowerment and require meaningful disclosure.

Status Update through March 2003

1. Regulatory Developments: Two-package Concept

As part of its basic comments to HUD on its proposed rule, ALTA proposed a two-package approach as a fall-back position should HUD move forward with a RESPA reform rule of some kind. We argued that HUD's one-package concept concentrate too much power in the hands of the lender, didn't accommodate the needs of the buy-sell transaction (particularly with respect to seller participation in the selection of and payment for settlement services), and it failed to consider the timing of the selection of the 1100 series services. Our two-package concept was outlined in skeletal form but we represented that it addressed many of these problems. Other organizations, mostly notably RESPRO, also advocated a two-package approach.

HUD has contacted ALTA and solicited from us greater detail on how we envision a two-package concept working in both regulatory form and in the real world. With the aid of outside counsel and input of the RESPA Task Force, we have developed an outline of how such a proposal might work. ***(See the ALTA's Proposed Position on the Two-Package Approach*** at www.ALTA.org ***)*** The Board and Government Affairs Committee will be considering this revised concept and the desirability of sharing it with HUD.

See Bundled Services Below. For the ALTA response to HUD's proposal click here.

2. Legislative Developments

ALTA sought and obtained several opportunities to testify on RESPA this winter. On February 25, ALTA President, Stanley Friedlander testified on the possible effects of the proposed HUD rule on our industry before the House Financial Service Committee Subcommittee on Housing. We had supportive comments and questions from several members of the Subcommittee. However, President Friedlander and the rest of the panel had several tough questions about support for the two-package approach.

ALTA Government Affairs Committee Chair and Section Representative Greg Kosin testified before the House Small Business Committee on RESPA Reform and the economic effects on small businesses. Chairman Don Manzullo (R-IL) berated the Administration on the inadequacy of their economic analysis at the hearing. He leveled heavy criticism on the Administration's failure to identify the potential effects on several segments of the real estate industry, including attorneys and title insurance agents.

Senator Richard Shelby (R-AL), Chair of the Senate Banking Committee, also held a hearing, and similarly berated Secretary Martinez on the inadequacy of the rule. ALTA testified at the Senate Banking Committee hearing on April 8, 2003.

Bundled Services

For a discussion of Bundled Services as they relate to RESPA and HUD provisions, see outline prepared by Philip L. Schulman, Esq. of Kirkpatrick & Lockhart, LLP, WWW.KL.COM for *The National Real Estate Development Center Guaranteed Mortgages Packages Conference* March 17-18, 2003 – Washington, D.C. See also *Lane v. RFC et al.*, Exhibit 71 of the attached Title Counsel Case Law Agenda.

HUD HITS ATTORNEY REFERRAL PAYMENTS

The Federal Government sent a message to real estate lawyers this past May when it announced it had settled a $200,000.00 civil complaint against 13 New York attorneys and their title agency.

The complaint accused the lawyers of improperly steering business to the title company where they were principal shareholders. U.S. Prosecutors from the Eastern District of New York alleged the group violated the Real Estate Settlement Procedures Act by earning payments on the volume of clients referred to New York – based Covenant Abstract Co. Inc.

While it is common for attorneys to have an interest in the title companies, RESPA requires that any party in a real estate deal who provides a referral must disclose any affiliation he or she may have with the referred firm.

Manhattan Lawyer, Eugene Licker, who represented the 13 defendants and the title agency, characterized his clients' actions as a technical violation of Section 8 of RESPA. He noted that the government never alleged, significantly, that the technical infraction injured anyone; nor that a single Covenant customer was harmed in any way; nor that the infraction either increased costs to consumers or compromised the quality of service Covenant provided to its customers.

We thank the Ejournal of the ABA for calling this civil complaint to out attention.

For further discussion of HUD's enhancement of its RESPA Enforcement Division, see the K&L Alert June 2003 issue, prepared by Kirkpatrick & Lockhart, LLP, entitled *THE NEW RESPA POLICE: HUD Fortifies the RESPA Enforcement Division.*

More on HUD Enforcement practices under ***Newsbrief***s below

RADIAN/MORTGAGE IMPAIRMENT INSURANCE

Issue: Several insurance companies and Radian, a mortgage insurer, have developed mortgage impairment products. ALTA and the title insurance underwriters have challenged the effort primarily on the state level, including litigation in California, alleging, inter alia, the product is inferior product providing the mortgage industry with less protection than the ALTA Loan Policy Forms.

Status Update through June, 2003

On May 1, 2003 Orange County California title insurers won a key victory when a state senate committee rejected senate bill SB344 that would have legalized a cost-saving, but controversial alternative to title insurance. The bill would have revised state law and allowed companies such as Radian to sell a substitute form of coverage known as "lien-protection" insurance. Supporters of the change said the bill would open up the title industry to much needed competition and save California homeowners millions in premiums. Opponents of the measure argue that the lien-protection insurance is an inferior product that relies on a substandard property search and provided lenders with only limited coverage compared to that provided by title insurance.

Ed. Note: During the past year there has been a flood of articles in the news media which demonstrate biased pro-Radian, anti-title insurance positions. Such articles have appeared in various newspapers, including the Orange County Register (*Title-insurance bill is Rejected),* Mercury News (*The Costly Rub with title insurance* and *California Probes Claims of Title Insurance Overcharges),* The Baltimore Sun (*Refinancers should seek lower rate on Title Insurance),* Detroit Free Press (*Refinancers should get Break on Title Bills),* Newhouse News Service (*Plan to Cut Closing Costs Meets Resistance in Congress),* San Jose Business Journal (*Lower Title Insurance Price, Consumer Groups Demand).* The Philadelphia Inquirer, published an article Tuesday, December 3, 2002 entitled "*Groups back alternative to title insurance*". Similar articles have also appeared in the New York Times, The LA Times, and the Wall Street Journal. The WSJ article appeared December 18, 2002. The headline read: *"Refinancing Boom Pressures The Obscure Title Industry: A Lucrative Business Feels a Push to Lower Fees, Speed Up Processing."* I would like to suggest that the author is not even remotely concerned with the title insurers contractual obligations to its insured under insuring clause 2, 5 and 6 of the ALTA Loan Policy.

In response to questions posed to her by the Wall Street Journal reporter, Professor Joyce D. Palomar, a leading academic and authority on title insurance, posted her comments in support of the title industries position to DIRT by post, dated December 18, 2002. For those interested in obtaining copies, please contact our publications office. They may also be obtained from the DIRT archives.

In June of 2002 the California Department of Insurance issued a Cease and Desist Order against Radian prohibiting them from selling its mortgage impairment product, known as Radian Lien Protection [RPL], because the Department deemed it a form of title insurance that Radian is not licensed to sell. The order further prohibited Radian from selling the product anywhere in the nation or risk losing its license to sell its core product, private mortgage insurance, in California. In mid-March 2003, Administrative Law Judge Leonard L. Scott upheld the Cease and Desist Order and the case was referred to the Commissioner to "adopt, reject, or refer the matter to Judge Scott to take additional evidence.

In mid-April 2003, The California Insurance Commissioner rejected the decision of the Administrative Law Judge in the matter of Radian Guaranty, Inc. and American Guaranty Corporation and announced he will decide the case based on additional evidence and testimony regarding the legal issues

surrounding the Radian Product. At the present time, the Cease and Desist Order remains in effect.

In the meantime, ALTA, on behalf of the of the mortgage Impairment Coordinating Committee, engaged Nelson Lipshutz, President of Regulatory Research Corporation [RRC] to prepare an economic analysis of the Radian product for the intended purpose of contradicting in a clear, convincing and unassailable manner a study commissioned by Radian claiming its product is less expensive to the consumer. A survey released earlier by Consumers Union claimed that the lack of competition in California drives up prices for title insurance in California. To the contrary, the study conducted by RRC warns that the Radian product may ultimately put consumers at additional risk due to the lack of title search investigation and lack of adequate reserves to pay claims. For more information please visit ALTA E-News at service@alto.org .

Since then, Fidelity National Financial, Inc. announced on May 30th, 2003 that they have filed a Master Lien Protection Loan Policy of Title Insurance with the California Department of Insurance. While similar to the Radian product, the significant difference from the RPL is that the Fidelity policy is not conditioned on the credit worthiness of the borrower and it is offered by a regulated title insurer licensed to sell this form of coverage.

USA PATRIOT ACT

Issue: The USA Patriot Act, enacted by Congress shortly after the terrorist attacks on September 11, 2001 directed the Treasury Department to develop anti-money laundering regulations for all categories of financial institutions, including insurance companies, and, through applicability of a section applying to bank-holding companies, including persons involved in and performing real estate closings and settlements, as those terms or phrases are included under the Bank Secrecy Act.

Background: The Treasury Department had issued interim rules to banks, effective April 2002, and deferred applicability to insurance companies and real estate settlement persons for up to six months.

Status Update as of March 2003

ALTA has established a working group of regulatory counsels who are advising on the issue, and will coordinate with the American Bar Association and the American Escrow association. Issues that the group are addressing include the need to: (1) know the identity of our customers; (2) check identity against the government list of suspected terrorists; (3) REPORT CASH TRANSACTIONS OVER $10,000; and (4) maintain records documenting the ID process. To some extent, we may be able to use existing cash reporting requirements and procedures already in place. In addition, we are concerned about potential liability. However, we also need to recognize potential underwriter-agent concerns and practical issues facing sole practitioners. The regulatory counsel group has recommended that we seek a regulatory safe harbor of industry practices.

ALTA had a program on this issue at the Federal Conference. We expect that Treasury will have a proposed rule for comment by that date.

Status Update as of June 2003

In April 2003, the Treasury Department issued and advance notice of proposed rulemaking seeking comment on the phrase "*persons involved in real estate closings and settlements.*" The comment deadline was June 9, 2003. Various real estate groups submitted comment to Treasury. Those groups and their comments may be found on Kevin L. Shepard's post to DIRT, dated June 12, 2003. Please call for copies by e-mail.

The Depart of the Treasury has adopted a final rule to implement customer identification procedures required by Section 326 of the Act, with an October 1, 2003 date set for compliance. The final Treasury customer-identification regulations issued under the USA Patriot Act were summarized in a treasury press release published and posted to DIRT on Thursday, May 1, 2003. The rule was published at 31 CFR Part 103, and 12 CFR Parts 21, 208, 211, 326, 563 and 748.Commentary on the legislation by Kevin L. Shepard, who chairs the *ABA Patriot Act task force of both the ABA RPPT Section and the ACREL*, may be found in his article appearing in the National Law Journal dated June 2, 2003 entitled "Deed . . . and terrorism" appearing at page 39. Kevin L. Shepard reports yet again on the New York Times article appearing May 28, 2003 describing how Treasury desires to impose anti-laundering requirements on the commercial real estate industry. See his DIRT post of May 29, 2003. Mr. Shepard may be reached directly at KLShepard@venable.com . DIRT may be reached at DIRT@LISTSERV.UMKC.COM .

The Practicing Law Institute posted an article relating an Anti-Money Laundering Checklist June 17, 2003 on it ***Lawyer's Tool box*** link, Volume 1, Issue 6 located at www.pli.edu . Call for copies.

Ed. Note: ALTA maintains a current suspicious persons list link on its home page located at www.alta.org .

TITLE ISSUES IN BANKRUPTCY LEGISLATION - McConville

Issue: In *McConville,* the Ninth Circuit failed to apply Section 549(c) of the Bankruptcy Code to allow perfection of a lender's lien after the borrower filed an undisclosed bankruptcy. The court limited the application of Section 549(c) to transfers of fee interests only. The case was appealed to the Supreme Court and certification was denied.

Background: ALTA has sought amendments to the Bankruptcy Code to clarify that a post petition transfer is valid and exempt from the automatic stay of bankruptcy. The amendments overturned the Ninth Circuit decision in McConville, and clarify that post petition transfers (1) are valid, (2) are exempt from automatic stay; and (3) may be transfers of security interests in real property. ALTA has been working on these amendments since 1996.

Status Update March 2003: In the 107th Congress, S220 the Senate version of ***Bankruptcy Reform Act of 2001,*** contained three separate provisions to address the problem created by *McConnville.* Unfortunately, one of the three provisions appeared to have been dropped in the Committee action on the bill. We needed to get a new paragraph, Sec. 311, added to S. 420, the updated version, in Conference with the House, The House-passed bill, H.R. 333, had all three provisions. On April 23, 2002, the Bankruptcy conferees met and agreed to all provisions, except for a provision dealing with abortion clinic protestors who declare bankruptcy. The Bankruptcy Conference report language considered at the end of the 107th Congress included all ALTA sought provisions. Again in the 107th Congress, the bill failed to pass. In the 108th Congress, ALTA has obtained the amendments to overturn McConnville. The amendments have now passed the House.

ALTA Forms Committee Report

The ALTA Title Insurance Forms Committee has been working on a project of standardizing frequently-requested "commercial" endorsements. All insurers (and many legal representatives of commercial lenders and developers) have differing versions of endorsements designed for the same purpose. In some cases, the language of these endorsements is quite unclear and has been negotiated in so many transactions that they may arguably be meaningless for the purpose intended. It is hoped that by establishing ALTA standard endorsements- with input from the ACRL and ALTA Lender Counsel members, Fannie Mae, Freddie Mac and other customer groups- we can bring some discipline and standardized meaning to many of these frequently request endorsement forms.

The Committee has completed all of the following endorsements (see copies attached). They are now circulating these endorsements to various customer groups as well as the ALTA membership, for comment this summer. The Forms Committee intends to present these endorsements to the ALTA Board (under the recent Bylaws amendments) for approval no later than the Board's Annual Convention Meeting:

ALTA Endorsement Form 14 (Future Advance-Priority)
ALTA Endorsement Form 14.1 (Future Advance- Knowledge)
ALTA Endorsement Form 14.2 (Future Advance-Letter of Credit
ALTA Endorsement Form 15 (Non-imputation-Full Equity Transfer
ALTA Endorsement Form 15.1 (Non-imputation –Additional Insured)
ALTA Endorsement Form 15.2 (Non-imputation-Partial Equity Transfer)
ALTA Endorsement Form 16 (Mezzanine Financing)
ALTA Endorsement Form 17 (Access and Entry)
ALTA Endorsement Form 18 (Single Tax Parcel)
ALTA Endorsement Form 18.1 (Multiple Tax Parcel)
ALTA Endorsement Form 19 (Contiguity-Multiple Parcels)
ALTA Endorsement Form 19.1 (Contiguity-Single Parcel)

In addition to these "commercial" endorsements, the Committee has completed work on a Short Form Expanded Coverage Residential Loan Policy. That Form is also being circulated for comments this summer for possible adoption in the fall. Creating a short form version of this policy will help our underwriters and agents to provide better and faster service to our customers. This continues ALTA's effort to have a short-form version of all of its residential loan policies.

The committee also has approved for circulation a modification of Cover Risk 12 in the ALTA Homeowner's Policy. We have included this language in this package for your review and comment. The amendment is designed to have this policy deal with CC&R coverage and environmental hazards similarly to the way the ALTA handles this matter in many of the ALTA endorsements such as the ALTA Form 4, 4.1, 5, 5.1, 9, 9.1, and 9.2 .

Please review these documents. If you would like to make comments, please make then in writing. Your comments should be addressed either to me at the above address or to The American Land Title Association, 1828 L. Street, N.W. , Suite 705, Washington, D.C. 20036, attention, James R. Maher.

ALTA Internal Auditors Meeting

The ALTA Annual Meeting of Internal Auditors was held in Key West, Florida on May 17th to 20th. The topics that were addressed were the following:

- Where is the Title Industry Going?
- Fraud Update
- Complying with the Patriot Act and Privacy Issues
- Complying with Sarbanes-Oxley Act
- Risk Modeling for Audit Selection
- Auditing Vendor Management Companies

The presentation on 'where the industry is going' was the most interesting. The prediction for the future was not for a reduction in the amount of business, but rather that business levels will sustain themselves, if not in re-finances, with sales. There is a prediction that the direct Savings & Loan business will re-emerge and gain considerable strength. The fraud update was by far the best. There are more defalcations out there, but the dollar volume has declined to one million or lower. Identity theft is growing by leaps and bounds.

Underwriters will require two forms of personal identification in the near future and it appears that we have a strong anti-fraud program that is totally complete and effective.

ALTA Federal Conference held

The 2003 ALTA Federal Conference was held Monday and Tuesday, April 14 and 15, 2003 at the Hyatt Regency Capitol Hill in Washington, DC. As a first time attendee to this Conference, I found it to be extraordinarily informative.

Some of the topics covered were:

- RESPA Reform and Compliance
- One-Stop Shopping
- Update on ALTA's Public Awareness Campaign
- Patriot's Act and other legislation regarding foreign funds
- Electronic Recording.

One session included Brian Grant, a Compliance Office with the U.S. Department of Treasury Office of Foreign Assets Control (OFAC) and Bruce Zagaris of the law firm of Berliner, Corcoran & Rowe. Mr. Grant spoke regarding Foreign Assets Control Regulations. While the Patriot's Act brought his Department to the forefront, there have been sanctions in place for over fifty years. He reminded us that all persons, including title insurers and real estate settlement professionals, are subject to OFAC jurisdiction. If you have any questions regarding a "march" during a search, OFAC can be reached at 202.622.24900 or 800.540.6322. Mr. Zagaris brought a different perspective to this discussion by outlining the Money Laundering Provision found in the Patriot Act.

Joanna Cooper of the Navy Federal Credit Union and John Frey, the County Clerk for Fairfax County, discussed in great detail the benefits of the E-Mortgage process and the electronic redoing of those mortgages. Ms. Cooper advised that the Navy Federal Credit Union estimates a savings of over $240.00 per file when utilizing the E-Mortgage system. Right now Mr. Frey is only recording E-Release of Mortgages for the Navy. Since January 2002, over 5,000 have been recorded. E-Recordings are returned to the filer fully recorded in 50 seconds. The gap period on those E-Recordings is 50 minutes.

Representatives from the Ervin Bell Public Relations Firm updated us on the status of the ALTA Public Awareness Campaign. Currently, ALTA is initiating a campaign to help the individual consumer understand the title insurance process. As ALTA often reacts to issues, this is an effort by them to be proactive.

Privacy, RESPA reform and One Stop Shopping were other hot topics. Speakers covered the RESPA issue on both days of the conference. One such speaker, Dr. John Weicher from HUD, outlined a new rule regarding Good Faith Estimates. The new rule had three purposes – 1. To disclose mortgage brokers fees; 2. To simplify the Good-Faith Estimate Form; and 3. To encourage competition among the mortgage providers.

The next Federal Conference will be held April 19 to 21, 2004. For those of you who have never attended, I hope to see you there.

Guest Columns Inquiries

Title Management Today and its editor values your thoughts and suggestions. We also welcome articles or case law analysis that may be of interest to the title insurance industry generally, and, particularly, to underwriters and claims litigation counsel. If you have an article you would like to share with our readership, please contact the editor directly at our e-mail address. Featured articles should be limited to approximately 3,500 words, or thereabouts. Contributing authors will be entitled to free admission to the otherwise subscription-only web site link.

Select Court Decisions & Commentary

- ***7th Cir. Ct. App. holds bankruptcy sale of Landlord Debtors property pursuant to 363(t) wipes out lease rights under 365(h)***. *See Precision Industries, Inc. v. Qualitech*, 2003 U.S. App. LEXIS 7612 (7th Cir. App. April 23, 2003).

Subject: Bankruptcy; fee owner/landlord/debtor rejects lease; 7th Cir.Ct.App. says "free & Clear" sale pursuant to 363(f) wipes out all lease rights under 365(h).

Devastating Seventh Circuit case permits free and clear sale to wipe out all lease rights under 365(h). Precision Industries, Inc. v. Qualitech, 2003 U.S. App. LEXIS 7612 (7th Cir. April 23, 2003)

This case, in the DIRT editor's view, is a particularly troublesome one. It is a bombshell on the order of magnitude of Durrett and Fleet Factors, and interested parties should seek to muster support for a petition for en banc rehearing and, if necessary, a Supreme Court appeal. It puts virtually all long-term leases and leasehold mortgages in mortal danger when the landlord files for bankruptcy.

In a case of first impression, the U.S. Seventh Circuit Court of Appeals has held that under 363(f) of the Bankruptcy Code, the sale of the lessor-debtor's real property "free and clear" of any "interest" trumps 365(h) of the Bankruptcy Code, which protects the rights of the lessee when the lessor-debtor rejects

a lease. As a consequence, all property interests of the lessee will be destroyed, leaving the lessee with a claim for damages that may or may not have priority against the sale proceeds, and certainly won't satisfy the property expectations of the lessee, or its leasehold mortgagee.

Section 363(f) provides that the trustee may sell property of the estate "free and clear of any interest in such property of an entity other than the estate" if [note the following are in the disjunctive]: applicable non-bankruptcy law permits such a sale; such entity consents; the interest is a lien and the sale price is greater than the aggregate value of all liens against the property; the interest is in bona fide dispute; or such entity could be compelled to accept a money satisfaction of the interest. The parties in this case conceded that a 363(f) authorized a sale in this case. [More on this in the comments.]

The debtors (collectively, "Qualitech") owned and operated a steel mill in Indiana. The lessees (collectively, "Precision") constructed a supply warehouse at the property, for the sole purpose of providing supply services for Qualitech. In 1998, Precision entered into a ten-year supply agreement with Qualitech. If an early termination or default occurred under either agreement, Precision had the right to remove all improvements and fixtures. Otherwise, Qualitech could buy the improvements and fixtures for $1 at end of term. [Although, arguably, the special facts here tend to differentiate this case from typical landlord bankruptcy cases, the court makes nothing of the distinction and its interpretations of Bankruptcy law apply universally.)

Qualitech filed its Chapter 11 bankruptcy petition on March 22, 1999, and on June 30, 1999, sold substantially all of its assets at auction pursuant to a sale order "free and clear of all liens, claims, encumbrances, and interest" under 363(f) of the Bankruptcy Code. The sale order approved the sale to a group of pre-petition secured lenders for $180 million. Precision, which had proper notice of the sale, did not object. The purchasers subsequently transferred their interests in the property to a new entity, ("New Qualitech"), which assumed the rights of the purchaser under the sale order and took title to the property. The sale order also provided that the purchaser retained the debtor's right to assume and assign executory contracts pursuant to 365 of the Bankruptcy Code. Negotiations subsequently ensued with respect to assumption of the lease, but were unsuccessful. The result, according to the Seventh Circuit, was that "Precision's lease and supply agreement were de facto rejected." By December 3, 1999, Precision had vacated and padlocked the warehouse on the property. Shortly thereafter, New Qualitech, without Precision's knowledge or approval, changed the locks on the building.

Precision then filed suit, claiming that its possessory interest in the leased property, pursuant to 365(h), survived the bankruptcy sale. The Bankruptcy Court held that, based on 363(f) and the fact that Precision's lease was an "interest" under the sale order, New Qualitech had obtained title to the property free and clear of Precision's leasehold interest. The District Court reversed, ruling that the terms of 365(h) prevailed over those of 363(f). The District Court reasoned that there was no statutory basis for allowing the debtor-lessor to sell its property and terminate an underlying lease, which would limit the lessee's post-rejection rights solely to cases where the debtor-lessor retained title and possession of the property.

The Seventh Circuit reversed the holding of the District Court, noting as a threshold issue that Precision never objected to the sale order and that "[s]ale orders are final, appealable orders," i.e., once the appeal period has expired, res judicata precludes a subsequent lawsuit contesting the order. The court then examined the meaning of the word "interest" in 363(f) (which term is not defined in the Bankruptcy Code), and found that based on applicable case law, a leasehold estate was clearly an "interest" subject to the provisions of 363(f). The court also noted that the parties never disputed the fact that the conditions of 363(f) (which, standing alone, authorized the sale of the bankruptcy estate's property, including any "interest" therein, free and clear of the lessee's possessory interest), had been complied with.

The court then turned its analysis to 365(h), and concluded that the terms of this section did not supersede those of 363(f). The court reasoned that because 363(f) does not contain any cross-reference subordinating its provisions to the lessee protections of 365(h), Congress did not intend for 365(h) to limit 363(f). (According to the court, "Congress authorized the sale of the estate property free and clear of 'any interest,' not 'any interest except a lessee's possessory interest.'" The court then held that 365(h) applies only where the trustee (or debtor in possession) actually rejects the lease, whereas in the present case, a statutory sale of the property (which was leased) had occurred. According to the court, "[t]he two statutory provisions thus apply to distinct sets of circumstances."

Finally, the court ruled that 363(e) provides a mechanism for lessees to protect their interests, i.e., it directs the bankruptcy court upon the request of any party with an interest in the property to be sold or transferred, to "prohibit or condition such . . . sale . . . as is necessary to provide adequate protection of such interest." The court reasoned that the lessee, therefore, was not without an adequate remedy to protect its interests, and that while it was not guaranteed continued possession of the property, it was entitled to adequate protection and could seek to "be compensated for the value of its leasehold interest -- typically from the proceeds of the sale" [but see comments below about the inefficacy of this protection].

The court also found, conversely, where the property is not sold and the lessor-debtor remains in title and possession and rejects the lease, the lessee is entitled to invoke its rights under 363(f) and remain in possession. Thus, according to the court,

both statutory provisions are given effect and are not in conflict. The court also reasoned that its interpretation "is . . . consistent with the process of marshalling the estate's assets for the twin purposes of maximizing creditor recovery and rehabilitating the debtor."

Commentary below set forth is made by Patrick A. Randolph, Jr., Elmer F. Pierson Professor of Law, UMKC School of Law and DIRT Editor.

Comment 1: There is obviously a major philosophical disagreement between the District Court and Appeals Court panel as to the proper application of the relevant statutory provisions, with both camps claiming that applicable case law (which, as the District Court noted, is divided on the issue) and legislative history support their respective positions.

It is interesting that the Seventh Circuit's statement (in connection with its ruling that that 363(f) trumps 365(h)) that, "Where the property is not sold, and the debtor remains in possession thereof but chooses to reject the lease, section 365(h) comes into play and the lessee retains the right to possess the property," is exactly the reason that the District Court held that 363(f) should not trump 365(h) ("There is no statutory basis for allowing the debtor-lessor to terminate the lessee's possession by selling the property out from under the lessee, and thus limiting a lessee's post-rejection rights solely to cases where the debtor-lessor remains in possession of the property."

Comment 2: The court's holding that 365(h) applies only where the trustee (or debtor in possession) actually rejects the lease, as opposed to the situation where a statutory sale under 363(f) occurs with respect to leased property, and its statement that "the two statutory provisions apply to distinct sets of circumstances," appears to be a distinction without a difference because the result is exactly the same in either scenario if, as the Seventh Circuit ruled in this case, 363(f) trumps 365(h). This appears to be a somewhat disingenuous attempt by the Seventh Circuit to shoehorn the facts into the statutory interpretation the court desires in this case.

Comment 3: Read again the language of 363(f) set forth in the text above. Which of those disjunctive conditions typically would apply to a lease? The editor proposes that none of them would. Here, the tenant didn't object to the sale, which gave the purchaser the right to avoid executory contracts (which the court ultimately interprets to include avoidance of any 365(h) rights of the tenant). But it would appear to be possible to object in the next case that 363(f) does not permit a sale free and clear of a lease because the lease does not fit within any of the conditions supporting a free and clear sale. Note that, because of the problems discussed in the next comment, if the judge disagrees, an appeal will be quite expensive. It is vital that the real estate community find a way to accomplish and win appeals of this interpretation of 363(f) at an early stage.

Comment 4: It is important to note that there is not really much good news in the court's suggestion that the lessee has the ability to avoid the terrible consequences of the destruction of its lease by asking the bankruptcy court to condition its sale so as to preserve the lease.

It is true that the lessee normally can get notice of the proposed sale. Although outside of a bankruptcy case, the seller and purchaser generally are free to keep a potential sale confidential, . In bankruptcy, the sale must be made public by the filing of a motion in the bankruptcy court requesting the court's approval of the sale. Notice of the sale must be provided to all creditors, unless the court limits notice to appointed committees, such as the unsecured creditors' committee and others who have formally requested notice of all matters arising in the case.

It is further true that there is language in the Code that suggests that a lessee can qualify for protection from a wipeout at the "free and clear sale." Section 363(e) provides that upon request of any entity that has an interest in such property, the court shall prohibit or condition such sale "as is necessary to provide adequate protection of such interest." But if the court refuses to do this, and the sale proceeds, the sale is final. When the bankruptcy court has approves the sale of property of the estate by a trustee,
363(f) provides that the buyer acquires title free and clear of all claims in bankruptcy and the property may not be brought back into the estate in the absence of fraud or collusion in the sale. Section 363(m) provides that the reversal or modification on appeal of a sale authorized by the court does not affect the validity of the sale to an entity that purchased the property in good faith unless such authorization and sale were stayed pending appeal. Thus, unless the party appealing a sale order obtains a stay pending appeal, a good-faith purchaser of assets is protected from reversal on appeal. The sale order often will contain an express finding of good faith as well as language similar to the following:

> *Pursuant to 11 U.S.C. 363(m), absent a stay of this Order pending appeal, the reversal or modification on appeal of this Order, or any provision thereof, shall not affect the validity of any sale transaction approved hereby which is consummated prior to such stay, reversal of modification on appeal.*

Under Rule 6004(g) of the Bankruptcy Rules, an order authorizing the use, sale, or lease of property is automatically stayed until the expiration of 10 days after entry of the order, unless the court orders otherwise. The trustee (and the purchaser) likely will seek to have the sale order contain specific language that, notwithstanding Rule 6004(g), the order is effective immediately (the same is true, under Rule 6006(d), for an order authorizing the trustee to assign an executory contract or unexpired lease).

In order to stay the sale on appeal of the judge's order, a lessee have to post an appeal bond. The same judge who has already

determined that it is in the best interest of the estate to wipe out the lease is the one who decides the amount of the bond. In many "big ticket" bankruptcies these days, the debtor's properties are packaged and sold in a single bundle, and many lessees cannot afford to post a bond to block a $200 million sale in order to protect their lease on a $10 million part of the package.

Reporter's Comment 5: The liens and claims that are cut off in a 363(f) sale attach to the proceeds of sale. Thus, there is some chance for the sold out lessee to recoup some damages with a priority claim other than as an unsecured creditor. But will there be any money to reach? Secured creditors will be feeding at the same trough, and remember that in a multi-parcel sale it will be quite difficult for the sold out lessee to segregate individual value from the parcel it occupied. Further, how will the lessee be able to prove damages? Establishing the value of a prematurely terminated long term lease has always been a major problem for state courts. Why will it be any different in bankruptcy? The same goes for Lost business expectations. And then there are the leasehold mortgagees, who undoubtedly will be elbowing the tenant aside to get satisfaction of their own mortgage debt (if they can). They will be seeking big prepayment premiums for the forced sale, based upon yield maintenance clauses that will also drain any possible value from the tenant.

Reporter's Comment 6: If we get to apply Section 365(h), there is indeed protection for the lessee. Although a lessor who files for reorganization may seek approval to reject a lease, the lessee then has the option to remain in possession for the balance of the lease term and any renewal or extension. Section 365(h)(1)(A)(ii) provides that the lessee may retain those rights in the lease that are in or appurtenant to the real property, "including rights such as those relating to the amount and timing of the payment of rent and any right of use, possession, quiet enjoyment, subletting, assignment or hypothecation," to the extent that such rights are enforceable under applicable nonbankruptcy law.

We thank Professor Randolph for calling this case to our attention in his DIRT Daily Development for Tuesday, April 29, 2003 reprinted in its entirety. Ed. Note: Jack Murray's Commentary may be found in his DIRT Post of 4/29/03 and at http://ul.firstam.com/landsakes/Bank040303.pdf .Commentary by Harris Ominsky may be found at *THE LEGAL INTELLIGENCER* for Monday, June 16, 2003 or the Blank Rome web site located at www.blankrome.com . Click on the publications link.

U.S. Supreme Court reigns in punitive damage awards citing due process clause of the 14th Amendment. See *State Farm Mutual Automobile Insurance Co. v. Campbell,* 538 U.S.(2003)

PUNITIVE DAMAGES/CLAIMS/BAD FAITH

The U.S. Supreme Court has put the kibosh on runaway punitive damage awards, reversing an award of $145 million based on compensatory damages of only $1 million, and citing the due process clause of the 14th Amendment.

The case is State Farm Mutual Automobile Insurance Co. v. Campbell, 538 U.S. ___ (2003). Here's what happened.

Curtis Campbell attempted to pass six vans on a two-lane highway in Cache County, Utah, causing Todd Ospital to lose control of his car and collide with a car driven by Robert Slusher. Ospital was killed, and Slusher was permanently disabled. Campbell and his passenger wife were unhurt.

Heirs of Ospital joined with Slusher to sue Campbell for negligence and wrongful death.

Campbell was insured by State Farm for a policy amount of $50,000 (or $25,000 per claimant). Despite Campbell's apparent liability and the plaintiffs' awful damages, State Farm declined offers to settle the lawsuit within policy limits.

The case was tried and a jury found Campbell 100% at fault, awarding damages of $185,849. At this juncture, State Farm told the Campbells that the Company would not pay any part of the $135,849 in excess liability. Campbell hired his own attorney to appeal the case.

Faced with this large uninsured liability, Campbell entered into an agreement with the plaintiffs whereby Campbell assigned his rights against State Farm (i.e., rights to sue the insurer for "bad faith" claims-handling) in exchange for plaintiffs' promise not to seek enforcement of the judgment against the Campbells.

Later, the Utah Supreme Court denied Campbell's appeal. State Farm then paid the entire judgment amount, reversing its earlier position. Nevertheless, attorneys for Ospital and Slusher filed suit, on behalf of Campbell, against State Farm, alleging "bad faith" claims-handling.

The case against State Farm was tried in two phases. In the first phase, a jury determined that State Farm's claims-handling had been unreasonable. In the second phase, the jury awarded Campbell compensatory damages (for emotional distress) of $1 million, plus punitive damages of $145 million. The punitive damage award was based on testimony about State Farm's nationwide claims settlement practices over a 20 year period, which the jury found outrageous and offensive in the extreme. After the trial, the trial court reduced this punitive award to $25 million. Both sides appealed.

Ultimately, the Utah Supreme Court upheld the original punitive award of $145 million. In so holding, the Court said it had applied principles explained by the U.S. Supreme Court in the case of BMW of North America, Inc. v. Gore, 517 U.S. 559 (1996). The Court also cited State Farm's "massive wealth." State Farm appealed to the U.S. Supreme Court, raising the federal question of interpretation of the 14th

Amendment to the U.S. Constitution, and the U.S. Supreme Court agreed to hear the case.

Now, the U.S. Supreme Court has reversed the Utah courts, and remanded the case for re-setting of the punitive award in accordance with this, its latest decision on the thorny issue of punitive damages.

In reversing, the U.S. Supreme Court offered further explanation of the "three guideposts" for determining reasonableness of punitive awards, which it first discussed in the 1996 Gore decision. These guideposts are:

> "...(1) the degree of reprehensibility of the defendant's misconduct; (2) the disparity between the actual or potential harm suffered by the plaintiff and the punitive damages award; and (3) the difference between the punitive damages awarded by the jury and the civil penalties authorized or imposed in comparable cases. (Cite.)"

As for the first guidepost, the Court said that much of the evidence of "reprehensibility" relied upon by the Utah Supreme Court was, in a word, irrelevant. Specifically, the Court criticized the Utah Court for placing emphasis on State Farm's "nationwide policies rather than for the conduct direct (sic) toward the Campbells," saying also that State Farm's conduct in other states may have been "lawful where it occurred." In this case, while the Court seemed to acknowledge the evidence of misconduct was serious, it nevertheless said almost all the evidence bore no relation, or "nexus," to the harm suffered by the Campbells. The Court concluded,

> "...because the Campbells have shown no conduct by State Farm similar to that which harmed them, the conduct that harmed them is the only conduct relevant to the reprehensibility analysis."

As for the second guidepost, the Court said there was unreasonable disparity between harm suffered by the Campbells and the punitive award against State Farm. While it declined to announce a "bright-line ratio," the Court cited one of its earlier decisions to the effect that "an award of more than four times the amount of compensatory damages might be close to the line of constitutional impropriety. (Cite.)" Also, citing "a long legislative history" in the U.S., which has favored punitive sanctions "of double, treble, quadruple damages," the Court said "(s)ingle-digit multipliers are more likely to comport with due process" than, for example, the ratio in this case (i.e., 145 to 1).

The Court continued its disparity analysis by explaining that a "higher ratio" of punitive to compensatory damages may be justified where "a particularly egregious act has resulted in only a small amount of economic damages. (Cite.)" And, said the Court, "(t)he converse is also true." "When compensatory damages are substantial, then a lesser ratio, perhaps only equal to compensatory damages, can reach the outermost limit of the due process guarantee." In this case, the Court said the compensatory award of $1 million, "for a year and a half of emotional distress," obviously included a "punitive component," so the accompanying punitive award should be reduced to avoid duplication of the punitive element.

As further evidence of disparity, the Court again pointed to evidence cited by the Utah Court which bore no relation to the harm suffered by the Campbells, as well as evidence of the great wealth of State Farm. Said the Court: "The wealth of a defendant cannot justify an otherwise unconstitutional punitive damages award. (Cite.)"

Finally, as to the third guidepost (i.e., difference between punitive damages awarded and civil penalties authorized by law), the Court said "the most relevant civil sanction under Utah state law for the wrong done to the Campbells appears to be a $10,000 fine for an act of fraud, (cite)." The Court said that criminal penalties should not be considered in this category, because criminal penalties are only assessed after "the heightened protections of a criminal trial have been observed, including, of course, its higher standards of proof." The Court also criticized the Utah Court for having considered possible loss of State Farm's business license, disgorgement of profits, etc., because "here again (the Utah Court's references were to the broad fraudulent scheme drawn from evidence of out-of-state and dissimilar conduct."

With that, the Court held the punitive award of $145 million an "irrational and arbitrary deprivation of the property" of State Farm, in clear violation of the due process clause of the 14th Amendment. Recommending a new punitive award "at or near the amount of compensatory damages," the Court remanded the case back to Utah for further proceedings.

Comment: This is a landmark decision. It puts strong limits on punitive damage awards by removing such considerations as the wealth of a defendant, out-of-state conduct that may be lawful where done, and all misconduct that bears no relation to the harm suffered by a particular plaintiff.

The decision also indicates that ratios of 4-to-1 (punitives to compensatories) will now be considered to be of borderline constitutionality.

Caveat: This case is perceived by the Court as involving economic loss to the Campbells, only, even though there must have been evidence of serious emotional distress (which usually involves physical symptoms of stress or discomfort). As such, the decision does not necessarily provide guidance in cases where a defendant's intentional misconduct causes "physical injury."

In any case, what's surprising here (seems to me) is the Court's apparent disinterest in evidence of intentional and system-wide maladministration of claims by State Farm. The evidence consisted of testimony of former employees of State Farm, as well as internal communications that the Company allegedly tried to conceal, spanning twenty years. As stated

by Justice Ginsburg, in a very interesting dissenting opinion, it's hard to understand how such damning evidence can be dismissed as having no relation to harm suffered by the Campbells.

Still, this decision was much-needed. For decades, businesses have had to cope with threats of litigation and implied threats of the "runaway jury" and "sky-high" punitive damage awards. This is especially galling when proof of liability and damages is weak, but we're characterized as "out-of-towners" with "deep pockets." The Campbell case will go a long way in helping to restore common sense to jury instructions.

Our thanks to Bert Rush of First American for calling this case to our attention in their landsakes listserv post of 4/29/03, reprinted in full.

Editor's Note: The following additional six cases where not part of the materials discussed at the last ALTA Title Counsel Meeting. The editor believes they should have been included in the agenda.

DEEDS, BOUNDARIES

Lamson Petroleum v. Hallwood Petroleum, 824 S..2d 1194 (La.App. 3 Cir. 2001) (Hart)

Comment: Description stating property is "bounded . . . by public road" does not convey any portion of the road and boundary was right of way line of the road.

DEEDS; CAPACITY; PRESUMPTION:

In re Conservatorship of Moran, 821 So.2d 903 (Miss.App. 2002)(Hart)

Comment: Properly executed deed has presumption grantor was mentally competent at the time of execution of the deed and clear and convincing evidence is required to overcome such presumption.

DEEDS; DELIVERY; ESCROW; CONDITION SUBSEQUENT

Smith v. Smith, 820 So.2d 64 (Ala. 2001)(Hart)

Comment: Delivery of deed to attorney/escrow agent is insufficient delivery to pass title where grantor conditions ultimate delivery upon note and mortgage by both grantees.

DEEDS; DELIVERY; CONSTRUCTIVE NOTICE; RECORDING ACTS

James v. Mabie, 819 So.2d 795 (Fla.App. 1 Dist. 2003)
Comment: Deeds was not effectively delivered where it was signed and handed to one grantee, but was never recorded. Don't hang your hat on this decision. Final, absolute and unconditional transfer of title that can not be recalled by the grantor is usually sufficient test to prove delivery between they parties; although if not recorded may not constitute constructive notice to third parties without actual knowledge of the
circumstances.

EASEMENTS; CREATION; GRANT; RESERVATION IN STRANGERS":
Beachside Preservation Association of Far Rockaway, Inc., v. Oceanview Associates, LLC, 753 N.Y.S.2d 133 (A.D. 2 Dept. 3003).

Comment: New York reaffirms rule that a grantor cannot create an enforceable easement benefiting land not owned by grantor. Further commentary may be found on the DIRT DD of 5/21/03 and replies regarding whether it is time to kill the no easements in stranger rule(?) which may be found on the DIRT Archives.

EASEMENTS; PARTY WALLS; RIGHTS
Sakele Brothers, LLC v. Safdie, 752 N.Y.S.2d 626 (A.D. 1 Dept. 2002)
Comment: Each adjoining property owner owns in severalty that portion of a party wall that lies along the boundary line between the two properties.

Decisions Discussed at ALTA Title Counsel

On the following pages appear the case law agenda discussed at the last ALTA Title Counsel Meeting together with brief commentary.

NB. In some cases we have made reference to cases which have also appeared on DIRT Daily Developments. DIRT is a real estate discussion group and a service of the American Bar Association Section on Real Property, Probate & Trust Law and the University of Missouri, Kansas City, School of Law. Patrick A. Randolph, Jr., copyrights daily Developments.

Alta Title Counsel Committee Meeting

ALTA TITLE COUNSEL
SPRING COMMITTEE MEETING

Fairmont Sonoma Mission Inn & Spa
Sonoma, CA
May 4-6, 2003

RECENT CASES

5. ABSTRACTER LIABILITY

Puget Sound Financial v. Unisearch, Inc. 47 P.3D 940 (Wash. 2002) (Davis) ***Exhibit 4***

6. ADVERSE POSSESSION; TACKING

a. *Zeglin v. Gahagen*, 812 A.2D 558 (Angelo) ***Exhibit 5***

This case involved boundary controversies. Landowners brought action for eject and trespass against neighbors who destroyed a row of bushed, that, for decades, incorrectly marked the boundary line between the properties. The Supreme Court determined that privity of possession was sufficient to enable landowners to tack predecessor's period of ownership, to establish boundary by consent under the theory of adverse possession.
Comment: The Doctrine of Acquiescence in a boundary requires privity of possession, but not privity of estate. NB Similar to the Doctrine of Acquiescence is the Doctrine of Consentable Line. Both are rules of repose. The former is usually argued in an action for ejectment and trespass while the latter is usually argued in an action to quiet title. For a discussion of the latter doctrine see Hart, The Law of Titles in Pennsylvania, 4th Ed., published by Title Law Associates and located at www.titlelawannotated.com

b. *Ellison v. Meek*, 820 So. 2d 730 (Matrick) ***Exhibit 6***

7. AFTER-ACQUIRED TITLE

a. *Arnold Industries, Inc. v. Love*, 63 P.3d 721 (2003) (Angelo) ***Exhibit 7***

8. BANKRUPTCY

a. *In re: Hood*, 2003 FED App. 0038P (6th Cir., 2003) (Therien) ***Exhibit 8***

b. *Archer v. Warner*, 538 U.S. ___ (U.S. Sup. Ct. 2003) (Rush) ***Exhibit 9***

Comment: Warner sold real and personal property to Archer. Thereafter, Archer filed suit in state court against Warner seeking, inter alia, recovery of money Warner allegedly obtained through fraud. The parties settled the lawsuit and released related claims. The settlement agreement did not resolve the allegations of fraud, but provides that Warner will pay Archer a fixed sum in installments. Warner does not pay the first installment and thereafter files a Chapter 7 petition in bankruptcy. The Bankruptcy Court ordered liquidation. Archer claims Warner's obligation to pay the fixed settlement sum is not dischargeable in bankruptcy. The Bankruptcy Court, the Federal District Court and the Appeals Court for the 4th Circuit all deny Archers' claim. The U.S. Supreme Court, on Writ of Certiorari to the U.S. Court of Appeals for the 4th Circuit reversed in finding that 11 U.S.C. 523(a)(2)(A) applied to a debt (in the case to promissory note) embodied in a settlement agreement that settled a creditors' earlier claim "for money obtained by fraud" that was thereafter dishonored.

c. *In re: Kolich*, 273 B.R. 199 (Rush) ***Exhibit 10***

Comment: Invoking a mathematical formula as provided for under 522(f)(2)(A) a Bankruptcy Appellate panel forth the 8th Circuit has held that a judgment lien may be avoided through bankruptcy where the total of all liens plus the debtor's homestead exemption exceeds the value of the property, even though the judgment lien has priority over other liens included in the calculation, and even though other liens included in the calculation may be considered "unsecured". Thus, debtors are allowed to avoid a judicial lien where they've otherwise over-encumbered the property.

NB For detailed analysis see Landsakes post of 12/26/02 by Bert Rush, LandSakes@firstam.com

d. *In re Dial Business Forms, Inc.*, No. 02-6009 ___ B.R. ___ (B.A.P. 8th Cir. 2002) (Rush) ***Exhibit 11***

Comment: An 8th Cir. Bankruptcy Appellate Panel has held that a lapsed security interest is still superior to and takes priority over a junior lien even though state law holds to the contrary. Further commentary appears in the TLA Newsletter Vol. 1 No. 20, Fall 2002 at page 8, appearing on the TLA

web site located at www.titlelawannotated.com . Please click on the title counsel agenda link.

e. *In re Baylis*, 313 F.3d 9 (1st Cir. 2002) (Rush) ***Exhibit 12***

Comment: This case discusses at some length the three interpretive theories used to establish the standard for measuring and determining defalcation by debtors acting as trustee of a trust that exist within the different circuits. More than 60 years ago Judge Learned Hand, in *Herbst*, held that there could be defalcation even in the absence of deliberate wrongdoing, noting that when a fiduciary takes money upon conditional authority which may be revoked and knows at the time that it may, he is guilty of defalcation though it may not be fraud or embezzlement A debtor fiduciary may not escape the exclusion from discharge of his debt arising out of defalcation by saying he had no specific intent. Circumstances will provided the level of wrongdoing needed to constitute a defalcation.

f. *Bonanno v. Peyton*, 312 F.3d 145 (4th Cir. 2002) (Davis) ***Exhibit 13***

g. *Ocwen Financial Services, Inc. v. Gilmore*, 284 B.R. 801 (Bankr. E.D. Va. 2002) (Davis) ***Exhibit 14***

h. *Pope v. Corbett (In re: Kathryn Ann Corbett)*, (Davis) [CONSTRUCTIVE NOTICE] ***Exhibit 15***

Summary: Debtor owned a certain parcel of real estate. Chapter 7 trustee filed a motion to sell the property. Respondent Bank objected to the sale of the debtor's real property without payment of the second mortgage which it claimed to have held. Bank claimed debtor gave this mortgage while she was married but had used her maiden name on the documents. When she filed for bankruptcy, she used a different name. The bank also argued that since the county maintained a separate index by tax identification number, the trustee had a duty to to search this index as well. However, the county never adopted an ordinance that required all transactions recorded in the recorder's office to be cross indexed by tax identification number. At issue was whether a title search should have fount the mortgage.
What the Court Held: The additional step of checking the tax identification number index was a duplicative effort that was not required for a search to constitute reasonable inquiry. Under Pennsylvania law, constructive notice is synonymous with whether the lien has been properly indexed; the state's indexing laws, in other words, define those circumstances under which a bona fide purchaser may be deemed to be on constructive of a lien. Thereafter the Court cites *Site Improvements, Inc. v Central and Western Chester Co. Indus. Dev. Auth.,* 293 Pa. Super. 1, 437 A.2d 960 (1981); *Demharter v. First Fed. S&L Assoc'n of Pittsburgh,* 412 Pa. 142, 194 A.2d 214 (1963); *Russeck v. Shapiro*, 170 Pa. Super. 89, 84 A.2d 514 (1951); *McLean v. City of Philadelphia, Water Revenues Bureau*, 891 F.2d 474, 478-79 (3rd Cir. 1989)
Comment: We wonder why the these cases were not considered or recited in the case below at ***Exhibit 24.***

i. *Beeler v. Jewell (In re: Stanton)*, 303 F.3d 939 (2002) (Davis) ***Exhibit 16***

9. CLOGGING THE EQUITY OF REDEMPTION

a. *Panagouleas Interiors, Inc. v. Silent Partner Group, Inc.*, 2002 Ohio 1304 (Ohio App. 2002) (Davis) ***Exhibit 17***

10 COMMITMENTS

a. *Michak v. Transnation Title Insurance Co.*, ___ Wa. 2s ___ (Wa. Sup. Ct. 2003) (Rush, Davis) ***Exhibit 18***

NB This case was previously reviewed by this publication in the April, 2003 issue, Vol. 13 No. 4 at page 10. For further commentary and discussion we refer you to *the* Title Insurance Law *Newsletter*, April 2003 issue at page 4

b. *Kawecki v. First American*, Ct. App. Tx. No. 01-01-00886-CV (Kletke) ***Exhibit 19***

11. COVENANTS

a. *Dornbach v. Holley*, 2002 WL 31875013 (Fla.App. 2 Dist.) (Uecker) ***Exhibit 20***

b. *Terrien v. Zwit*, 648 N.W.2d 602 (Mich. 2002) (Uecker) ***Exhibit 21***

c. *Chestnut Real Estate Partnership v. Huber*, 811 A.2d 389 (Md. App. 2002) (Davis) ***Exhibit 22***

d. *Namleb Corp. v. Garret*, 814 A.2d 585 (Md. App. 2002) (Davis) ***Exhibit 23***

12. CONSTRUCTIVE NOTICE

a. *First Citizens National Bank v. Sherwood*, 2003 PA Super. 47 (2003) (Rush) ***Exhibit 24***

NB This case was previously reviewed by this publication in the March, 2003 issue, Vol. 13 No. 3 at page 11. Further Commentary is set forth below.

Purchaser of property allegedly subject to a mortgage that was properly recorded but defectively indexed brought a quiet title action against the mortgagee. The Pennsylvania Superior Court considered whether a subsequent purchaser of real estate is deemed to have received notice of a mortgage lien where the lien was misindexed but was properly recorded in the office of the Recorded of Deeds. The court concluded that if the finder of fact concludes under an objective standard of reasonableness that a diligent search has been made, then the result of that search shall constitute notice.

Comment: This case considers what constitutes a diligent search of the public records and what constitutes constructive notice when an instrument is improperly indexed. The court disregards the prior S.Ct. case of *Prouty v. Marshall*, 225 Pa. 570, 74 A. 550 (1909) which held that a subsequent purchaser may rely upon the index and where a mortgage is improperly indexed there is not adequate notice of its existence. In doing so the Court suggests that, in light of the computerization of public records, it may now be possible to go beyond the Russell Indices and retrieve computerized information relevant to encumbrances on property. This is a blockbuster of a case in that it challenges existing case law regarding what constitutes constructive notice from the public records as defined both by existing law and in the ALTA title policy, and in doing so opens up a Pandora 's Box. It also blurs the distinction between actual v. constructive notice.

The Court acknowledges that in the past it might have been successfully argued that the index alone should control and that to require a purchaser to go beyond the index placed an unfair burden upon him. In that regard the Court examined the law of several states, including Florida, Maryland, New York, New Jersey and Washington, in an effort to determine what constitutes notice to subsequent purchasers where a mortgage lien has been improperly indexed. The Court cited and seized upon the New Jersey case of *Howard Savings Bank v. Brunson,* 244 N.J. Super. 571, 582 A.2d 1305 (1990). The *Howard* Court emphasized “the reasonableness of the search approach”. The Pa. Court adopted this approach and determined the purchaser must take all reasonable steps to discover encumbrances in order to have performed a diligent search. Thus, the court concluded that in counties where the records are not easily accessible the finder of fact may conclude that a search of the indices is sufficient. Whereas in those counties where the (we presume computerized) records are easily accessible, then a diligent search may require a review of those records also *notwithstanding the fact that those records are not a part of the public record as defined by law* (italicized added and emphasis mine). In adopting the objective standard of reasonableness the court then remanded the case back to the lower court for further proceeding consistent with its opinion.

This is a terrible opinion. It does not distinguish between computerized court house records and on-line real estate records. It implies that in those areas where computerized records are available they should be reviewed and it does so without setting any standard for the accuracy, authenticity or source of the record. The on-line real estate records of which the editor is aware all contain a disclaimer as to accuracy. The case also results in the creation of a double standard, because the question of ease of “accessibility” may be differ among different finders of fact. Rural counties would become subject to one set of “search rules” while metropolitan counties would become subject to a different set. Who determines when the rules change? Supposing the provider of the computerized records systems goes out of business. Supposing the computerized records systems don’t perform as they are supposed to and another system has to be purchased and the records have to be re-computerized. If this decision is remains uncontested it will wreck havoc upon the

law of conveyancing in Pennsylvania.

Contra: see cases cited under ***Exhibit 15*** above.

13. DELIVERY OF DEEDS

a. *Rothrock v. Rothrock*, 2003 Tex. App. LEXIS 2430 (Angelo) ***Exhibit 25***

14. DEEDS OF TRUST; LIMITATION PERIOD; POWER OF SALE

a. *Nicolopulos v. The Superior Court of Los Angeles*, 2003 Cal.App. LEXIS 226 (2003) (Klarin) ***Exhibit 26***

The California Court of Appeals has correctly held that a deed of trust could be foreclosed upon even though the note secured by the deed of trust matured 10 years earlier, and there had been no payments on the note for at least 7 years. NB California law follows, for the most part, the title theory of deeds of trust which holds that a deed of trust actually transfers title in a quasi-trust status with power of sale held by the trustee for foreclosure purposes only.

15. DEFALCATION

a. *Hechtman et al. v. Nations Title et al.*, 2003 WL 252130 (Fla.) (Kletke) ***Exhibit 27***

16. DUTY TO DEFEND; TITLE INSURANCE

a. *Schwartz v. Stewart Title Guaranty Co.*, 731 N.E. 2d 1159 (Ohio 1999) (Angelo) ***Exhibit 28***

Header: Title company has no responsibility to provide legal support for insured's efforts to determine title defects when defects are not the basis of a third party adverse claim, i.e, title insurer has no duty to pay for a suit voluntarily brought by the insured to clear title of a alleged title defect; and, title insurer has no duty to pay defense unless there is an attack upon title.

Comment: This case first appeared in *the Title Law Associates Newsletter* Fall Issue of 1999. It did not begin to circulate widely until 2002 when it first appeared on the Firstam landsakes listserve and shortly thereafter as the DIRT DD of November 7, 2002. The case deals primarily with the question of marketability. In addressing the issue of whether a title insurer has a duty to pay loss for pre-existing defects, the Ohio App. Ct. held that the title insurer had no duty to pay losses on a claim based on court action that the insured initiated and prosecuted against the developer. This holding affirms the principle that a title insurance policy is a policy of indemnity, not a guarantee.

ED. Note: For additional commentary see Bush Nielsen's DIRT comments of Nov. 7, 2002. Jack Murray in his DIRT reply of Nov. 7, 2002 points out that a somewhat similar issue arises when the insured demands the title insurer resolve an alleged claim when no loss has yet occurred and no third party has attached the title.

b. *Kuhn v. Ohio Bar Title Insurance Co.*, 2001 Ohio App. 5708 (2001) (Angelo) ***Exhibit 29***

c. *Hartford Casualty Insurance Co. v. Chase Title, Inc.*, 2003 U.S. Dist. LEXIS 3088 (D.Md.2003) (Davis) ***Exhibit 30***

17. DUTY TO INSURED

a. *Sintros v. Hamon*, 2002 WL 31415783 (N.H. 2002) (Kletke) ***Exhibit 31***

b. *Levinson v. Fidelity National*, Sup. Ct. NY No. 03/002636 (Nassau 2003) and eight other cases (Maher) ***Exhibit 32***

18. EASEMENTS

a. *Jelen v. Patterson*, 818 So.2d 1270 (Miss.App. 2002) (Matrick) ***Exhibit 33***

b. *Forster v. Hall*, 265 Va. 293, 576 S.E.2d 746 (2003) (Davis) ***Exhibit 34***

19. EMINENT DOMAIN

a. *In re Condemnation by the City of Coatesville*, 2003 Pa. Commw. LEXIS 194 (2003) (Angelo) ***Exhibit 35***

20. ESCROW

a. *Old Republic Title v. Santangelo & Cohen*, 750 N.Y.S2d 16 (Uecker) ***Exhibit 36***

Facts: An agent of Old Republic participated in a closing where a problem arose when the sellers' prior mortgagee failed to provide a timely payoff statement. In order to facilitate the closing, the law firm representing the sellers signed a written agreement "undertaking to provided to the title agent within 30 days a payoff receipt for the mortgage in question" and to " hold the sum of $110,000.00 in escrow to pay off said mortgage and upon paying said amount to provide proof of said payment to (the title agent), and have a satisfaction of mortgage in recordable form forwarded to (the title agent). Title closed but no satisfaction was delivered.
Held: A New York Court of Appeals has held that an attorney may be liable to satisfy his client's mortgage, where at closing he agreed in writing to provide a "pay-off" and otherwise made representation as set forth above.
Comment: This is a welcome decision to the title Industry. Not only was the agreement unconditional, it was also in the nature indemnity running directly from the law firm to the tile insurer. There are some ancillary issues involved her as well which deserve some consideration in the event this were to happen again in the future. Will the attorney attempt obtain a reimbursement agreement from his client in the event the actual pay-off figure exceeds the amount held in escrow? Would the attorney be subrogated to any rights that there may be in favor of his client? In either event doesn't this create a conflict of interest between the attorney and the client?

Our thanks to Ken Jannen of First American for posing these suggestions.

b. *Hirsch v. Bank of America*, 2003 SOS 1630 (Therien, Klarin) ***Exhibit 37***
Comment: [INTEREST; UNJUST ENRICHMENT] Although title companies are not liable for breach of fiduciary duty to taking "Kickback" benefits when they are deposit escrow monies in banks offering such benefits, the banks themselves may be liable for unjust enrichment when they charge excessive cash management services for management of funds attracted by the kickback scheme. For further commentary see the Spring 2003 Issue of the *ABA REAL ESTATE QUARTERLY REPORT* at page 33

c. *Denaxas v. Sandstone Court of Bellevue, LLC*, 63 P.3d 125 (2003) (Angelo, Rush, Kletke, Davis) ***Exhibit 38***

Comment: This case was previously reviewed by the publication in its March 2003 issue, vol. 13, No. 3 at page 6. We provided further commentary herewith.

The Washington Supreme Court, in reversing the Court of Appeals unpublished but worrisome 2001 decision, has held that an escrow agent has no duty to tell buyer that property description does not match the legal description in the contract and further, that an escrow agent may not be held liable for failure to advise the a purchaser of the difference between the essential terms of a purchase agreement and the closing documents, in the absence of express escrow instructions to the contrary. This is another case addressing the fiduciary obligations of an escrow agent who conducts closings, including fiduciary duty and negligence. The case is important because the court determined the role of escrow agent *as being defined by the instructions of the parties* (emphasis mine). NB In this case there were no allegations of fraud. This case is to be distinguished from *Bishop v. Jefferson Title Co.*, 28 P.3d 802 (Wash. 2001) (prior comment *TLA Newsletter*, Spring 2002, p 11, ALTA Title Counsel, Spring, 2002, Exhibit 42). In that case the Wash. S.Ct. determined that an escrow agent may be liable for negligence in document preparation. In this case the Contract legal description was prepared by the broker from an "on-line" search while the title commitment contained the proper legal description. Compare to *Mark Properties v. National Title Co.*, 34 P.3d 587 (Nev. S.Ct. 2001), as revised. For further commentary see DIRT DD 5/2/03 and Landsakes Post of 4/7/03. Ed. Note: The case also illustrates the risk of performing an "on-line" search of title.

21. FAIR DEBT COLLECTION PRACTICES ACT

a. *Parks v. Portnoff Law Associates*, 243 F. Supp. 2d 244, 2003 U.S. Dist. LEXIS 777 (2003) (Angelo) ***Exhibit 39***

22. FAIR HOUSING

a. *Meyer v. Holley, et al.*, 123 S. Ct. 824 (2003) (Davis) ***Exhibit 40***

23. FORECLOSURE

a. *Apao v. The Bank of New York*, U.S. Ct. of App. 9th Cir. No. 0116565 (2003) (Therien, Klarin) ***Exhibit 41***

b. *Jones v. First American Title Insurance Co.*, 2003 Cal. App. LEXIS 447 (2003) (Angelo, Klarin) ***Exhibit 42***

Comment: The California Court of Appeals has allowed the reformation of a Substitution of Trustees of a deed of trust to validate a foreclosure sale. This is an interesting case in that the bank intended to substitute themselves as trustee for the released property only, but the document was a full substitution for all the property secured by the deed of trust and, the borrowers initiated numerous delaying tactics in an attempt to delay foreclosure. Full analysis by Bert Rush may be read on the Firstam website located at LandSakes@firstam.com

b. *Nguyen v. Calhoun*, 105 Cal. App. 4th 428 (2003) (Rush) ***Exhibit 43***

Comment: This case involves competing claims between the parties to property scheduled for foreclosure sale. The Court determined that Calhoun, purchaser at foreclosure sale, acquired superior title to the property, regardless of defaulting borrower's sale of property to plaintiff on same day as foreclosure sale because (i) lender filed a notice of default and election to sell; (ii) plaintiff had constructive knowledge and took title to the property subject to the lender's preexisting deed of trust (iii) the prior lender was not notified of the funding of plaintiffs loan and transfer of title and (iv) the underlying obligation was not satisfied prior to the scheduled foreclosure sale. Further analysis and commentary on this case may be found on the DIRT DD of April 22, 2003 or you can contact our office.

Ed. Note: See also Bush Nielsen's newsletter of 2/2003 at page 6 for further commentary.

24. FORFEITURES

a. *U.S. v. Premises Known as 7725 Unity Avenue North*, 294 F.3d 954 (2002) (Uecker) ***Exhibit 44***

25. FRAUD

a. *Baker v. Cambridge Chase, Inc.*, Sup. Ct. of Pa. No.s. 1589 & 2180 (2002) (Angelo) ***Exhibit 45***

b. *FBI Fraud Alert Warning* (Angelo) ***Exhibit 46***

26. GOOD FAITH PURCHASER

a. *Bonner v. Norwest Bank Minnesota, N.A.*, 571 S.E.2d 387 (2002) (Davis) ***Exhibit 47***

27. LEASES

a. *Taranto Amusement Co. v. Mitchell Associates, Inc.* 820 So.2d 726 (Miss. App. 2002) (Matrick) ***Exhibit 48***

b. *Syufy Enterprises, L.P. v. City of Oakland, Calif.*, (Klarin) ***Exhibit 49***

28. LIEN PRIORITY

a. *BB&T of South Carolina v. Kidwell*, 565 So.E 2d 316 (S.C. 2002) (Kletke) ***Exhibit 50***

28A LIMITATIONS PERIODS; CLAIMS

a. *Stewart Title Guaranty Co. v. Hadnot*. 2003 Tex. App. LEXIS 1787

Ed. Note: The Texas Court of Appeals has held that the statute of limitations for a bad faith/breach of contract claim runs from the date when the claim is denied.

29. LIS PENDENS

a. *National City Bank et al. v. Fruchtman et al.*, 121 Ohio Misc. 2d 92 (2002) (Currie) ***Exhibit 51***

30. MARKETABLE TITLE ACT

a. *Severns v. Union Pacific Railroad Co.*, 101 Cal.App.4th 1209 (2002) (Uecker) ***Exhibit 52***

31. MECHANIC'S LIENS

a. Wright Construction Co. v. Superior Court , 2003 SOS 865 (Cal. 2003) (Klarin, Cavallaro) ***Exhibit 53***

b. *A.F. Construction Co. v. Virgin River Casino*, 118 Nev.Adv. Op. No. 72 (2002) (Therien) ***Exhibit 54***

c. *Sachs Electric Co. v. H.S. Construction Co.*, 836 S.W 3d 445 (Mo. 2002) (Kletke) ***Exhibit 55***

32. MINERAL RIGHTS

a. *Calvert Joint Venture #140 v. Snider*, 816 A.2d 854 (Md. 2003) (Davis) ***Exhibit 56***

33. MOBILE HOMES

a. *In re Kroskie*, 2003 WL 104939 (6th Cir.(Mich.)) (Uecker) ***Exhibit 57***

34. MORTGAGES

a. *Townsend v. Chase Manhattan Mortgage Corp.*, 254 Mich.Spp. 133, 657 N.W.2d 741 (2003) (Uecker) ***Exhibit 58***

Comment:

b. *In re Consolidated Mortgage Satisfaction Cases*, 97 Ohio St. 3d 465 (2002) (Currie) ***Exhibit 59***

NB This case was previously reviewed by this publication in the April 2003 issue, Vol. 13, No. 4 at page 12. For further commentary and discussion we refer the reader to *The* Title Insurance Law *Newsletter* issue of April 2003, at page 6.

c. *Cottingham v. The Citzens Bank*, 2003 Ala. LEXIS 13 (2003); 2003 Westlaw 133246 (Davis) ***Exhibit 60***

Comment: This is a case involving the question of an open-ended mortgage where the court determined that a mortgage that provides that it secures a certain note, "and all renewals, extensions, and modifications," shall not be construed as a note securing future advances and, consequently, when the loan balance is paid down to zero, the mortgage is deemed cancelled.

Ed. Note: Further analysis and commentary may be found in the *ABA Real Estate Quarterly Report*, Winter 2002 beginning at page 35. Call for copies.

35. NEGLIGENT MISREPRESENTATION

a. *Lawyers Title v. Biak*, 55 P.3D 619 (Wash. 2002) (Davis) ***Exhibit 61***

36. OPTIONS

a. *Estate of Smith v. Samuels*, 822 So.2d 366 (Miss. App. 2002) (Matrick) ***Exhibit 62***

37. POLICY COVERAGE

a. *Elysian Investment Group, LLC v. Stewart Title Guaranty Co.* 105 Cal. App. 4th 315 (2003) (Angelo, Kletke, Cavallaro) ***Exhibit 63***

Comment: This case addresses issues of Substandard Notice; Coverage; Marketability. A California Court of Appeals has held that that are recorded notice of substandard improvements may not give rise to coverage under a title insurance policy, as a "defect, lien or encumbrance " or as a matter resulting in "unmarketability of title," where the notice merely provided a warning about the physical condition of the land and applicable building and zoning ordinances and was not a notice of enforcement. The case is good authority for the proposition that a title company has no duty to defend a perceived defect in the property which does not affect title. Furthermore, the plaintiff cannot rely upon an exclusion to coverage to extend coverage or to manufacture some basis for coverage under the insuring provision for unmarketability.

Ed. Note: additional discussion and commentary my be found on the DIRT post of March 4. 2003. Further commentary by Bush Nielsen in his newsletter of February 2003 page 1.

This case is in keeping with a decision of the New Jersey Superior court in the case *Aldrich v. Hawrylo*, 656 A.2d 1304 (N.J. Super, 1995) as discussed in the *Title Insurance Law Newsletter* for June & July 1995 at page 6, wherein the NJ Court was quoted as determining that a the set-back restriction imposed by zoning variance approval fell with the "police power" exclusion.

For an interesting juxtaposition to *Aldrich* the reader is

referred to *Sunderlin v. National Attorneys Title Insurance Co.*, Vol 213, No. 102 New York Law Journal 35 (May 30, 1995) wherein the N.Y. Trial Court, in interpreting the language of Exclusion Clause 1, nonetheless held the title company responsible for "actual Loss" incurred by the insured because of a non-conforming use. In that case the N.Y. Court emphasized that a title policy insures against unmarketability and *liens or encumbrances that affect title.* The court then reasoned that since an encumbrance is a burden . . . . that may interfere with the use and enjoyment of the property, a violation of a zoning ordinance is a form of burden and thus could affect marketability. We hope this case will go a long way in resolving such judicial thought.

b. *Universal Holdings II Ltd. Partnership v. Overland Christian Church*, Ct. App. Wash. No. 49584-4-I (Kletke)[Breach of Contract; Bad Faith] ***Exhibit 64***

Comment: Where title company deliberately failed to send policy to owner until after litigation had begun company was liable to property owner for loss caused by faulty legal description in policy even though owner had failed to provide company with required statement of loss. Alleged non-compliance with policy terms will not release insurer from its obligations unless insurer can show actual prejudice. Property owner was entitled to recover attorneys fees for breach of contract by insurer where was forced to bring suit to obtain benefits of the policy

c. *Omega Healthcare Investors v. First American*, 2003 WL 79037 (D. Mass) (Kletke) ***Exhibit 65***

Ed. Note: For a good commentary in this case see Bush Nielsen's newsletter March 2003 issue at page 7

d. *Gray v. First American*, 2003 WL 220606 (Cal.App.2 Dist.) (Kletke) ***Exhibit 66***

Comment: California Court of Appeals insured's transfer of property to partnership terminates policy coverage. This case was previously reviewed by *Title Management Today* [TMT] in its March 2003 issue at page 8. We like Bush Nielsen's Commentary appearing in his newsletter Of March 2003mwhere he states: "This decision is the fourth in a series of cases holding that a title policy terminates on conveyance from an insured to a related entity." The cases are cited thereafter.

e. *Magna Enterprises, Inc. v. Fidelity National Title Insurance Co.*, 127 Cal. Rptr. 2d 681 (2002) [Access; lack of] (Kletke, Cavallaro, Davis) ***Exhibit 67***

Comment: Insured brought action against title insurer for breach of contract, bad faith and declaratory judgment after servient owner challenged insured's right to use easement across abutting shopping center and adjacent parking lot. Held: Policy insures against lack of right of access. That right is legal in nature. The fact that access is difficult or impractical does not trigger coverage under policy insuring clause relating to access.

f. *Mortgage Associates, Inc., v. Fidelity and Deposit Co. of MD*, 105 Cal. App. 4th 28 (2002) (Cavallaro, Kletke) ***Exhibit 68***

38. PREEMPTION

a. *U.S. v. Jacobsen*, 319 F.3d 323 (8th Cir. 2002) (Uecker) ***Exhibit 69***

39. RAILROAD RIGHT-OF-WAY

a. *Mauler v. Bayfield*, 309 F.3d 997 (7th Cir. 2002) (Uecker) ***Exhibit 70***

40. RESPA

a. *Lane v. Residential Funding Corp. and Chicago Title Co.*, 2003 U.S. App. LEXIS 4439 (9th Cir. 2003) (Angelo, Lane, Kletke, Cavallaro, Klarin, Maher) ***Exhibit 71***

Header: The 9th Circuit of the Court of Appeals has held that discounted title and escrow rates for volume purchasers are allowed under RESPA.

NB This case was previously reviewed by the this publication in its April 2003 issue, Vol. 13, No. 4 at page 7. We provided further commentary herewith.

Comment: This case involves section 8 (a) litigation regarding volume discounts. The U.S. Court of Appeals for the 9th Circuit considered the question of where the granting of a volume discount represents an impermissible thing of value for the referral of business under RESPA Section 8(a). The Court held that a lower price

offered Chicago Title Ins. Co. on escrow services to an entity that sells a lot pf properties, and where there are no demonstrable economies to the title company in dealing with the seller, are not violations of Section 8(a).

The case is important because (i) it addresses a long standing question on which HUD has generally held the opposite view and (ii) because of the potential implications within a packaging regime. The case would appear to support the proposition that lower prices offered to a packager, that may be justified by the economies of scale of getting a large number of transactions from the packager, are not inducements for the referral of business otherwise prohibited by Section 8(a). While arguably limited to discounts to the seller or other parties who would otherwise bear the price of the services, a reasonable argument can be made that the case would support a package discount as well since HUD believes these services are rendered to the packager. Depending on the details of a package arrangement, the case may support such discounts even without any rule governing packaging coming out of HUD. In that case much of the "carrot" HUD had been using to induce lenders to package would now be moot. For further discussion see Landsakes post of 3/24/03.

Ed. Note: We don't see much difference in the term "packaging regime" and "bundled services" as they are applied to vendor management companies. What we do see is case law support for new HUD proposals that would fundamentally change the way in which the mortgage market and settlement service providers operate, wherein the largest lenders, in exchange for a volume discount from the large title insurers, could threaten the survival of small business providers, including the much smaller regional title insurers. For a further discussion of the is review Sheldon Hochberg's Article appearing in the ALTA *Title News* of January/February 2003 and Philip Shulman's article on Bundled Services cited upon at page 13 under the current RESPA Developments. We wonder if these consideration might change another commentators opinion regarding the prospect of dire consequences noted above.

b. *Gardner v. First American*, U.S. Dist. Ct. No. Civ. 00-2176(RHK/AJB) (Minn. 2003) (Kletke, Maher) ***Exhibit 72***

41. RIGHT OF FIRST REFUSAL

a. *Gryczman v. 4550 Pico Partners, LTD, et al.*, 2003 909 1382 (Cal. 2003)(Klarin) ***Exhibit 73***

42. RIGHT OF REDEMPTION

a. *Lewis v. Premium Investment Corp.*, 351 S.C. 167, 568 S.E.2d 361 (2002) (Uecker) ***Exhibit 74***

43. STATUTE OF LIMITATIONS

a. *Stewart Title Guaranty Co. v. Hadnot*, 2003 Tex. Ap. LEXIS 1787 (Angelo) ***Exhibit 75***

The Texas Court of Appeals has held that the statute of limitations for a bad faith/breach of contract claim runs from the date when the claim is denied.

NB This case was previously reviewed by the this publication in its April 2003 issue, Vol. 13, No. 4 at page 6.

44. SUBROGATION

a. *First Union National Bank v. Nelkin*, 808 A.2d 856 (N.J. Super. App. Div. 2002) (Davis) ***Exhibit 76***

Comment: Where a refinancing lender is aware of a prior open-end (home equity) mortgage and doesn't take steps to cancel the prior mortgage and the future advance features when it pays of the balance of that mortgage, it cannot expect to gain superiority over that earlier mortgage and the refinancing lender will not be subrogated to the amounts paid on the first mortgage in preference to other advances later made pursuant to the future advance feature

For further analysis and commentary see *ABA Quarterly Real Estate Report*, Winter 2002 beginning at page 37. Commentary also provided by Ira Meislik located at www.meislik.com . Clink on recent decisions for October 2002

45. SURVEY EXCEPTION

a. *State Farm Insurance Co. v. Peda*, 2003 Ohio 1092 (Ohio App. 2003); 2003 WL 943884 (Ohio App. 11 Dist) (Davis) ***Exhibit 77***

Ed. Note: Survey exception found not to be ambiguous in contradiction to *Walker Rogge v Chelsea Title & Guaranty Co.,* 116 NJ 517 at 532; 563 A.2d 208. 216 (1989). See Bush Nielsen's commentary in the *The* Title Insurance Law *Newsletter,* April 2003 issue page 1.

46. TENANTS BY THE ENTIRETY

a. *In re Knapp*, 2002 WL 31255096 (N.D. Tex.) (Kletke) ***Exhibit 78***

47. TRUSTS

a. *Austin, Trustee v. City of Alexandria, et al.*, 265 Wa 89, 574 S.E.2d 289 (2003) (Davis) ***Exhibit 79***

Comment: A deed to a trustee effects a change in ownership of property, even if the grantor, the trustee and the beneficiary of the trust are all the same persons.
Ed. Note: For further commentary and discussion see DIRT DD of April 4, 2003 and Special Guest Column appearing in *The* ***Title Insurance Law*** *Newsletter* of May, 2003. See also discussion at ***Exhibit 66***, supra.

48. UNAUTHORIZED PRACTICE OF LAW

a. *In the Matter of Lester*, 2003 WL 939649 (S.C.) (Uecker) ***Exhibit 80***

LEGISLATION AND REGULATION

49. *Kansas Attorney General Opinion No. 2003-14*: *Kansas Controlled Business Statute Interpreted.* (Maher) ***Exhibit 81***

Noteworthy Articles and Library Publications

August, *Defalcations - Show Me the Money,* the ALTA T*itle News*, March/April 2003 issue, page 26;

Bonita, *Beware the Misuse of Title Insurance Policy Non-imputation Endorsement,* ACREL News, December 2002, page 7;

Clark, *Preventing Title Insurance Fraud,* the ALTA T*itle News*, November/December 2002 issue, page 16;

Davis, *The creditors' Rights Exclusion and The Bankruptcy Code,* ABA TIPS Committee Newsletter, Winter 2002;

Johnson, *Why Craft Isn't* Scary appears in the RPPTJ Fall issue, Vo. 37, No. 3.

Murray, *Enforceability of Intercreditor Agreements in Bankruptcy,* The Practical Real Estate Lawyer, page 27, January 2003;

Ominsky, *Modified Mortgage May Not Stand Up Against Junior Mortgage,* March/April 2003 issue of Probate & Property, page 38;

Newsbriefs

HUD Announces New Anti-Flipping Rule

As a result of lenders using subterfuge and blatantly unethical behavior and practices, HUD has published a final rule that addresses property "flipping" on FHA-insured mortgages. The rule, titled "FR 4615: Prohibition of Property Flipping in HUD's Single-Family Mortgage Insurance Programs," makes recently flipped properties ineligible for FHA mortgage insurance. It also allows the FHA to better manage its insurance risk by requiring additional support for a property's value when a significant increase between sales occurs. Re-sales occurring on or less than 90 days of acquisition will not be eligible for a mortgage insured by the FHA. For more information on FR 4615, visit www.hud.gov. A good discussion of Flipping and Predatory Lending may be found in the TLA Newsletter ALTA Title Counsel Agenda for the Spring, 2001. Copies are available.

In a related development the mortgage Bankers Association met on June 17 in Washington, D.C. along with various enforcement agencies including, inter alia, Treasury, HUD, the Federal Reserve Board, the FTC, the Department of Justice and state regulators to discuss how they could all work together to protect consumers and combat abusive predatory lending practices. Predatory lending is the use of unfair and abusive mortgage lending practices that result in a borrower paying more through high fees and/or interest rates than the borrower can afford of that his or her credit history warrants.

N.J. Predatory Lending Bill Becomes Law.

On May 2, 2003, New Jersey Governor James McGreevy signed *The New Jersey Home Ownership Security Act of 2002* into law. It is the strictest predatory lending law in the country. The legislation prohibits, inter alia, financing of credit insurance, penalty interest rates, interest on interest, balloon payments and unfair arbitration standards. The Act, which addresses abusive predatory lending practices, will

become effective seven months from May 1st. For an analysis of the Act, as prepared by the Department of Banking and Insurance, e-mail info@mbanj.com.

Title Management Today is a quarterly news magazine that supplements materials presented on the Title Law Associates web site located at www.titlelawannotated.com . As successor by reason of merger with ***the Title Law Associates Newsletter***, it is the one publication that presents to both the land title industry and the Real Estate Bar those cases selected by ALTA title underwriting counsel as significant to the industry for inclusion in the Spring and Fall ALTA Title Counsel Meeting Agenda. This publication is designed to provide title company employees, officers, agents, approved attorneys and real estate lawyers general information prepared by professionals with regard to the subject matter covered. It does not include full legal analysis of the matters presented. It is distributed with the express understanding that the Publisher and the Editor are not engaged in rendering legal opinions or advice. We recommend a full review of the cases listed. This publication should not be utilized as a substitute for specific legal services. As circumstances warrant, if legal advice or other expert assistance is required, the services of a professional should be sought.