

Title Management Today

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CURRENT DEVELOPMENTS

CONGRESS PASSES NEW REVISION TO THE SOLDIERS' AND SAILORS' CIVIL RELIEF ACT

On December 19, 2003 President Bush signed into law a new bill passed by congress designating the Soldiers' and Sailors' Civil Relief Act (108 P.L. 189; 117 Stat. 2835; 2003 Enacted H.R. 100) as the Servicemembers' Civil Relief Act, replacing the *Soldiers' and Sailors' Civil Relief Act* from 1940. The new law is a complete revision of the prior Act. To access a complete copy of the new Act, try <http://www.mortgagebankers.org/industry/docs/04/HR100enr.pdf>. The entire bill may also be viewed by checking the Thomas website for HR 100 or S. 1136. An overview may be found on the February 3, 2004 post by Douglas J. Sanderson to the DIRT Bulletin Board located at DIRT@LISTSERV.UMKC.EDU. There is also an adobe attachment of the entire act attached to another post of that date by Donald P. Woodell at 4:57 PM

Like the old version, this Act provides protective rights to the men and women serving in our armed forces. What are most important to the title industry are the provisions that allow for extended redemption rights and defenses to the foreclosure of liens. Inasmuch as the new act is a complete restatement, I should like to point out some of the pertinent sections of the new act as they apply to title examiners and title insurers.

Sec. 101. DEFINITIONS

- (1) **The term 'servicemember' means a member of the uniformed services...**

This includes Army, Navy, Air Force, Marine Corps, Coast Guard, National Guard, Public Health Service, the National Oceanic and Atmospheric Administration, to name a few. In addition, Sec. 104 extends these rights to any U.S. citizen serving in any *other* Allied Forces.

Sec. 107. WAIVER OF RIGHTS PURSUANT TO WRITTEN AGREEMENT

- (a) In General a servicemember may waive any of the rights and protections provided by this Act. In the case of a waiver that permits an action described in subsection (b), the waiver is effective only if made pursuant to a written agreement of the parties that is executed during or after the servicemember's period of military service. The written agreement shall specify the legal instrument to which the waiver applies and, if the servicemember is not a party to that instrument, the servicemember concerned.
- (b) **Actions Requiring Waivers in Writing:** The requirement of subsection (a) for a written waiver applies to the following:

- (1) The modification, termination, or cancellation of
 - (B) an obligation secured by a mortgage, trust, deed, lien or other security in the nature of a mortgage...

As stated, the Servicemember may waive these rights in writing, but cannot waive them prior to entry into "Military Service" (which can mean from receipt of call-up orders or induction notice to 90-180 days after discharge). So language in a mortgage which purports to waive these rights cannot be relied upon if the borrower subsequently is covered by this Act.

Sec. 201. PROTECTION OF SERVICEMEMBERS AGAINST DEFAULT JUDGMENTS.

(b) Affidavit Requirement

- (1) Plaintiff to file affidavit: In any action or proceeding covered by this section, the court, before entering judgment for the plaintiff, shall require the plaintiff to file with the court an affidavit stating:
 - (A) whether or not the defendant is in military service and showing necessary facts to support the affidavit; or
 - (B) if the plaintiff is unable to determine whether or not the defendant is in military service, stating that the plaintiff is unable to determine whether or not the defendant is in military service.
- (3) Defendant's military status not ascertained by affidavit: If, based upon affidavits filed in such an action, the court is unable to determine whether the defendant is in military service, the court, before entering judgment, may require the plaintiff to file a bond in an amount approved by the court.

NB This is the Affidavit of Non-Military Service which we have always required to insure title through foreclosure. This section also provides for a stay of not less than 90 days if the defendant is in the military. An additional provision allows the servicemember the ability to file for a stay up to 90 days after being discharged from the service.

Sec. 206. STATUTE OF LIMITATIONS

- (b) Redemption of Real Property. NB a period of military service may not be included in computing any period provided by law for the redemption of real property sold or forfeited to enforce an obligation, tax or assessment.

Be careful when dealing with titles that include tax foreclosure sales in the chain. In addition, Sec. 501 deals with the sale of property to enforce taxes, and must be considered. What kind of evidence a municipality might offer to overcome the issue of military service of the taxpayer has yet to be determined.

Sec. 303. MORTGAGES AND TRUST DEEDS

- (a) Mortgage as Security. NB This section applies only to an obligation on real or personal property owned by a servicemember that:
 - (1) originated before the period of the servicemember's military service and for which the servicemember is still obligated; and
 - (2) is secured by a mortgage, trust deed, or other security in the nature of a mortgage;

- (c) Sale or Foreclosure: NB A sale, foreclosure, or seizure of property for a breach of an obligation described in subsection (a) shall not be valid if made during, or within 90 days after, the period of the servicemember's military service except as follows:
- (1) upon a court order granted before such sale, foreclosure, or seizure with a return made and approved by the court; or
 - (2) if made pursuant to [a written waiver under sec. 107]

These provisions would seem to indicate that if the borrower is a serviceperson, a power of sale may not be relied upon without court approval.

Other sections may apply to Land Contracts or Purchase Sale Contracts.

THE REAL ISSUE

The real issue becomes what title insurance companies and underwriters will now accept as sufficient proof for an Affidavit of Non-Military service. Minimally it should be expanded to cover all of the parties covered by the new law, including U.S. citizens serving in other Allied Forces. The penalties for violation include fines and imprisonment, in addition to the voiding of the title if the information on the affidavit should prove false or insufficient.

NEW WEB SITE AVAILABLE

There is a new website for a commercial search service located at www.ServiceMemberCivilReliefAct.com which is supposed to be online within a month. This website will generate inquiries to all of the military branches, including the Public Health Service. Inquiries by customers and/or their attorneys need to be made in a timely fashion. The Navy, in particular, takes over 10 weeks to respond.

CASE LAW AND COMMENTARY

CONSTRUCTIVE NOTICE; RECORDING ACTS; WHAT CONSTITUTES RECORD

A. *Story Bed & Breakfast v. Brown County Area*, 794 N.E. 2d 519 (Ind.App. 2003)

Comment: Indiana Appeals Court has held that land use restrictions contained in a statement of planned unit development filed in the County Plan Commissioner's Office alone are not enforceable against a *bona fide purchaser* [bfp] and do not provide bfp with reasonable notice of the unrecorded land use restrictions contained therein. The Court reasoned that plaintiff was not required to search plan commission files for land use restrictions when the problem could have been avoided the problem by recording the restrictions in the court house records. For similar decisions see the following:

- *Ioannou v. Southold Town Planning Bd.*; 758 N.Y.S. 2d. 358 (A.D. 2 Dept. 2003) noting a restrictive covenant prohibiting the subdivision of property in not binding on a purchaser when such restrictive covenant is filed only in the office of the planning board. The New York Court observed that the that the planning records were outside the normal chain of title; Contra: *Sunderlin v. National Attorneys Title Insurance Company*, (S. Ct. Newburgh Co., N.Y. # 1994-13158) holding zoning violation made title unmarketable;
- *Island Venture Associates v. New Jersey Dept. of Environmental Protection*, 359 N.J.Super 391, 820 A.2d 88 (App.Div. 2003) noting that a state agency that requires a deed to contain a restrictive covenant as a condition for the property's development has a responsibility to see that the deed contains the restriction; if it does not, then a purchaser without knowledge of the restriction is entitle to rely on the record;

- *Aldrich v Hawrylo*, 656 A.2d 1304 (N.J. Super. 1995) holding that a setback restriction imposed by zoning variance approval fell within 1992 ALTA Policy Ex. Cl. 1, a/k/a as the “police power” Clause.
- *Ellingson v. Franklin County*, 810 P.2d 910 (Wash. 1991) holding recording of road easement in office of county engineer does not provide constructive notice even statutes designates office as “Office of Record”;
- *City of Lakewood v. Mavromatis*, 817 P.2d 90 (Colo. 1991) holding that subsequent purchasers had no constructive notice of a city right of way claim was contained in a road petition delivered to the county clerk for entry in the road book but not entered in the grantor/grantee index;
- *The Danza Group, Inc. v. Planning Board of the Township of Mahwah*, N.J. Super. App.Div. 2001 (unpublished) holding land use restrictions on site plan approvals must be in writing and recorded if they are to serve the purpose of public notice.

Ed. Note: This decision supports 1992 ALTA Policy C&S 1(f) definition of “public records”. Further cases cited in Patton and Palomar on Land Titles, 3d Ed., sec. 12, 17 & 21. (Thompson/WestGroup, 2003). Our thanks to Professor Patrick Randolph for calling this case to our attention in the Fall, 2003 issue of the *ABA Real Estate Quarterly Report*. We hope the PLTA, in its Amicus Brief presented to the PA Supreme Court, used these and other citations an effort to overcome *First Citizens National Bank v. Sherwood*, 2003 Pa. Super 47 reviewed previously in the March, July and Nov/Dec. 2003 issues of this publication.

MORTGAGES; PROHIBITION AGAINST ENCUMBRANCES; VALIDITY; AFFECT UPON FORECLOSURE

B. *Bank Midwest Minnesota, Iowa NA vs Lipetzky*, (S.Ct. MINN. C1-02-1747) (1-16-04)

Comment: Clause restricting the “transfer” of a parcel of land which was contained in a Contract for Deed conveying property from parents to son and daughter-in-law invalidated bank’s mortgage after foreclosure proceeding were commenced.

Contract for Deed between James and Tamara Lipetzky and his parents for purchase of part of family farm contained a clause stating, inter alia, “buyer agrees they cannot sell, transfer or assign this property with written permission or consent of seller.” Notwithstanding the foregoing clause the contract vendee’s mortgage their interest and assigned their rights under the contract to the lender as addition security for the debt. Vendees defaulted, bank foreclosed and parents thereafter attempted to set aside the contract. In return, the bank sought a declaratory judgment declaring mortgage and assignment were enforceable. Trial court ruled both document were invalid. Appeals court reverse as to mortgage alone. On further appeal the Supreme Court found the mortgage was also invalid. In so finding the court held that since the contract was recorded and the lender took an assignment of it as security for the debt, the lender had actual and imputed knowledge of its terms and conditions.

BANKRUPTCY; AUTOMATIC STAY; TAX FORECLOSURE; FINALITY

C. In re: *Matter of Pierce*, 2004 U.S. App LEXIS 1316 (5th Cir. 1/29/04)

Comment: Automatic Stay voids deed transferred under state tax foreclosure when bankruptcy filed after foreclosure sale but shortly before actual delivery of deed. Court does not annul automatic stay retroactively pursuant to 362 (d) and validates tax sale because it concludes debtor filed petition in good faith believing delinquent taxes had been paid by lender after lender threatened to foreclose following debtor’s failure to pay property taxes. Once again the finality of tax sales is brought into question. The question then becomes will title insurers undertake to insure the transfer of title to property derived through tax sale? Practice Suggestion: Foreclosure and sale remain subject to the regularity of such proceedings and the underlying title resulting therein including delivery and recordation of deed and disbursement of funds.

Further analysis of this decision may be found on the DIRT listserv. Post of February 3, 2004 located at DIRT@LISTSERVE.UMKC.EDU . DIRT is an internet discussion group sponsored by the American Bar Association Section on Real Property, Probate and Trust Law and the University of Missouri, Kansas City, School of Law, Patrick A. Randolph, Editor.

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