July 2007 Chicago Title EXAMINER VOLUME 1 / ISSUE 2

Tales From the Vault – Claims Stories

A cancellation must be legitimate – after all, it's RECORDED! WRONG!!

Delinquent Dolly, way behind on her mortgage to Big Bank, finds on the internet a service that "eliminates" her mortgage for the small sum of $3,000 plus a percentage of profits on a refinance. So she quitclaims her home to D. Scott Heineman and Kurt F. Johnson in California, as trustees for the "Dolly Family Trust." Heineman then sends letters to Big Bank saying their mortgage is illegal and illegitimate (based on an very interesting analysis by accountant, Todd-Ellis;Swanson -- punctuation is intentional), then he appoints himself as attorney-in-fact for Big Bank, possibly even provides a certificate saying it is a "bond" or "surety" (with Dorean as the assurer), signs a cancellation as attorney-in-fact for Big Bank (properly signed and notarized and, therefore, recordable). Then Dolly immediately gets a new loan with Loser Lender, without paying off Big Bank because Inattentive Independent fails to carefully check the purported "satisfaction" leading "Liable Lawyer" to close on the new loan, disburse the funds part to Dolly and part to Heineman-Johnson. RESULT: Heineman takes a huge chunk of money (to federal prison with him), Dolly has a house with two mortgages, very little money to show for it, and title in the trustees in California for which no trust agreement can be found. Big Bank has a first mortgage; Loser Lender has a second mortgage (extremely undersecured), and the attorney who closed without paying closely supervising Inattentive Independent has a major title problem! NOTE: If Dolly tries to clear up the title, payoff Big Bank and/or sell to a new purchaser, at least under the presumed authority to convey under the new Uniform Trust Code, an attempted reconveyance by the trustee to Dolly should be retroactively cured. Just in case, a Superior Court Order has been entered and recorded locally by the North Carolina Attorney General to rescind these transactions. But these will not resolve Dolly's now significantly increased financial problems! And the taxes may be listed in the trustee and delinquent with notices going to a non-existent PO Box! This is the Dorean Group "vapor money" situation, earlier discussed in Bull 31, and much discussed again of late.

RED FLAGS:

- quitclaim deed to unrelated third party from another state
- punctuation in party's name; power of attorney from Big Bank
- attorney-in-fact conveys to himself
- no payoff at this closing
- recent purported satisfaction with no other refinance or sale that would explain the source of funds
- non-NC (California style) "cancellation" or "reconveyance" of Big Bank mortgage signed by attorney-in-fact
- request to pay all of the sales proceeds (over costs) to various parties

MORAL: Payoffs rarely appear out of thin air, satisfactions must be closely scrutinized, and if it doesn't seem to make sense, further due diligence by the closing attorney is imperative!

Your job just got easier!

Chicago Title EXAMINER
150 Fayetteville Street, Ste. 570
Raleigh, NC 27601

POSTAGE

Chicago Title EXAMINER

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CALENDAR OF EVENTS

August 9-11
NCLTA Annual Convention
Mid Pines Resort / Southern Pines

August 14
CREW Charlotte Meeting
Westin / Charlotte

September 11
CREW Charlotte Meeting
Westin / Charlotte

September 12
CTIC Customer Coffee
Island Brews / Southport

September 13
Metrolina Paralegal Assoc. Meeting
Charlotte

September 13
CTIC Customer Coffee
Morehead City Office

September 20-22
NC Paralegal Assoc. Mid-Year Seminar
Boone

October 3-6
CREW Network Convention & Marketplace
Denver, CO

October 10
CTIC Customer Coffee
Island Brews / Southport

October 11
CTIC Customer Coffee
Morehead City Office

NEW ALTA 2006 OWNER'S AND LOAN POLICIES ARE HERE!

CTIC UNDERWRITING TEAM

Chicago Title and other insurers are now issuing the new ALTA Loan Policy (6/17/06) and the ALTA Owner's Policy (6/17/06) policy forms. The format of the 2006 policy forms has changed significantly from that in the ALTA Loan Policy (10/17/92) and ALTA Owner's Policy (10/17/92). There were four (4) insuring clauses on the 1992 form owner's policy and seven (7) on the 1992 form loan policy. These have been replaced in their entirety by certain "Covered Risks," of which there are ten (10) on the owner's policy and fourteen (14) on the loan policy. In part, these are just a restatement and clarification of coverage that was already provided in the old policy forms. In some instances the Covered Risks just expand on and give examples of the types of things covered by the old Insuring Clauses. In other instances, the Covered Risks just affirmatively and unambiguously provide coverage for things that were largely covered by the old policy by virtue of "exceptions to Exclusions" from coverage.[1] These exceptions to the Exclusions from Coverage are deleted in the new forms, which is essentially the only change to the Exclusions from Coverage from the 1992 forms. Additionally, there are certain changes to and omissions from the Conditions and Stipulations sections of the 1992 owner's and loan policy jackets, renamed "Conditions" in the 2006 policy forms. A number of the changes to the policy forms are minor and technical in nature. For now we want to draw your attention briefly to some of the most meaningful and substantive changes so that they will not catch you by surprise!

1. Enhanced definition of "Insured"— elimination of "Fairway" issue. There has been an expansion of parties constituting the insured in both the 2006 owner's and loan policies. Of particular significance in the new form owner's policy is the fact that successors to an Insured by its conversion to another kind of Entity (i.e. a partnership dissolution) are now deemed to be insureds. This has eliminated the need for a Fairway endorsement. Also, wholly-owned transferees where no consideration is paid for the conveyance are insured entities that would have standing to make a claim—a new policy or endorsement is no longer necessary at the time of transfer.

2. Elimination of Co-insurance provisions in 2006 Owner's Policy. Coinsurance provisions under the Conditions and Stipulations 7(b) of the 1992 owner's policy were complicated and difficult to explain; but essentially they provided for diminished coverage in the event a property was insured for significantly less than its market value, or insured for a less than the as-built value following contemplated development and construction. A number of large nationally-recognized companies required an endorsement deleting the coinsurance provisions. This will no longer be an issue and under-insuring is less of a concern (though it is still not a great idea!).

3. Coverage for taxes "due or payable." Covered Risks 2(b) of the 2006 policy forms was intended to clarify and state affirmatively that liens arising from current unpaid taxes would be a covered matter. Interestingly, the forms committee chose to use the language "due or payable" instead of "due and payable." In North Carolina, taxes are "due and payable" on September 1, by statute. But they can be paid, and are therefore "payable," as soon as tax rates are set (which can even be before tax bills are sent out in August or September - or as early as July in some counties). Lenders typically will only accept an exception to taxes that are not yet due and payable, and look for the tax exception to be worded that way. The new Covered Risks language now means that attorneys need to consider whether taxes are "payable," since lenders may require such taxes to be paid (i.e. may require the tax exception to say "not yet due or payable").

4. Enhanced definition of "Indebtedness" in loan policy. The expanded definition of "Indebtedness" in the 2006 loan policy now expressly includes more types of financial loss for which the lender may be compensated, such as pre-payment premiums, exit fees, and foreclosure expenses. Most notably, the definition of Indebtedness now clearly includes post-policy principal advances, which becomes important to the lender when the "measure of loss" provisions are employed. However, although the measure of loss is enhanced, this change does not create coverage for enforceability, validity, or priority of such advances. For this specific coverage, a Future Advances endorsement will still be necessary (ALTA Endorsement Form 14 in North Carolina).

5. Subsequent Advance Coverage in 2006 Loan Policy. Mechanics lien coverage has been clarified by new Covered Risks 11(a) of the 2006 loan policy, which more clearly expresses that such coverage is given to each and every advance with respect to construction work commenced before or after the policy date (unless otherwise excepted to in Schedule B). Additionally, the limitations contained in Conditions and Stipulations 8(d)(i) and (ii) of

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WHAT'S INSIDE!

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Your job just got easier!

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SOAP BOX

Scott Mansfield

Circle of Excellence

Scott Mansfield, Assistant Vice President and State Underwriting Council located in the Charlotte office, was awarded the Customer Advocate Award in the Circle of Excellence at the Chicago Title Insurance Company Corporate Convention held in Las Vegas, Nevada on June 21-23rd. The Circle of Excellence was created to recognize and reward those non-management employees of Fidelity National Title Group, parent company of Chicago Title Insurance Company, who continually perform their jobs above and beyond the call of duty. The Customer Advocate Award goes to any one employee from any department nationwide who has exceeded expectations and consistently demonstrated a commitment to excellent customer service and satisfaction.

Also receiving awards on the Direct Office level at the convention were Carolyn Wells, (Gold level), Assistant Vice President and Business Development Representative for Wilmington, Morehead City, Southport, Jacksonville and New Bern offices; Judy Farrell (Silver Level), Assistant Vice President and Manager of the Charlotte office; and Sarah Funkhouser (Bronze Level), Assistant Vice President and Business Development Representative for the Charlotte and Monroe offices.

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Stay updated with frequent visits to the CTIC website. Locate offices, search legal articles and download needed forms. Add the site to your list of Favorites today!

CHICAGO TITLE HAPPENINGS

STRESS, LIES AND REAL ESTATE: A DAY IN THE LIFE OF A LAWYER.

Chicago Title has announced the dates for our 2008 CLE seminars to be held in various locations around the state as follows:

February 4 – Asheville
February 5 – Gastonia
February 6 – Charlotte
February 7 – Hickory
February 18 – Wilmington
February 19 – Greenville
February 20 – Raleigh
February 21 – Greensboro

Make sure you save the date for another engaging seminar.

Handbook for South Carolina Dirt Lawyers, a straightforward book designed to help South Carolina real estate practitioners and their staff stay out of the Advance Sheets and remain in their closing conference rooms, is now available at www.scbar.org (select Continuing Legal Education - Publication Store - Real Estate). The handbook is authored by Chicago Title's own Claire Manning, South Carolina State Underwriting Counsel. It is her first publication and is very useful for those firms whose clientele cross state lines.

HANDY REFERENCES

HTTP://WWW.IRS.GOV/PUB/IRS-PDF/P1459.PDF
IRS ACTURIAL TABLES FOR COMPUTING VALUE OF LIFE ESTATE, REMAINDER INTEREST, ETC.

10 USCS 1044
MILITARY POWER OF ATTORNEY

NCGS 105-228.29
EXEMPTIONS FROM EXCISE TAX ON CONVEYANCES

NCGS 44 68.10
UNIFORM FEDERAL LIEN REGISTRATION ACT

NCGS 29 17
SUCCESSION BY, THROUGH AND FROM ADOPTED CHILDREN

PRACTICE PITFALLS

....and how to avoid them

When is a non-owning spouse required to sign an instrument (deed or deed of trust) in order to convey marketable, insurable title to the real property free and clear of any interest of that spouse?

The law in North Carolina is fairly well-settled in the context of a conveyance of fee title: a non-owning spouse must either join in the conveyance or there must be a satisfactory waiver of marital rights recorded in the public records in the county in which the real property is located. Note that in the case of a severance of a tenancy by the entireties, a simple quitclaim deed between spouses is insufficient to allow the retaining owner to convey without the signature of his/her non-owning spouse. The conveying spouse gives up their title interest, but not their contingent inchoate marital rights (unless the quitclaim deed contains an adequate waiver of marital rights).

The same rules apply to the granting of a lien on property owned by only one spouse—joinder by the non-owning spouse is required unless there is an adequate recorded waiver of marital rights. The ONLY exception is the situation of a purchase by one spouse only which is secured by a contemporaneous purchase money deed of trust in which all proceeds of the loan are advanced at closing and used for purchase of the land; i.e., the deed of trust must not contain any equity line, construction, or other future advance provisions. In this instance (all proceeds of the loan advanced at closing and used for purchase of the land), instantaneous seisin would give the lien of the deed of trust priority over inchoate marital rights of the non-vested spouse. Most title insurance companies, including Chicago Title Insurance Company, will insure such a deed of trust in favor of a purchase money lender without exception for the marital rights of the non-owning spouse.

BUT BEWARE: Attorneys need to remember that this is only a quick fix that allows the transaction to close and is not prudent practice. When the vested spouse later wants to sell or refinance and is told that they now need the non-owning spouse to sign, they will likely be upset if the issue hasn't been fully explained (especially if that spouse is now estranged!). If you close a purchase money loan and rely on title insurance coverage rather than getting the signature of the non-owning spouse or an adequate waiver of marital rights, EXPLAIN TO YOUR BORROWER/VESTED PROPERTY OWNER IN WRITING THAT THE SIGNATURE OF THEIR SPOUSE WILL BE REQUIRED ON A SUBSEQUENT REFINANCE OR A SALE!!

Check out our website www.northcarolina.ctt.com for further information and marital rights waiver forms.

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POLICIES / CONTINUED FROM PAGE 1

the 1992 policy have been deleted such that, in conjunction with the new definition of Indebtedness, coverage is now clearly given for subsequent principal advances under the insured loan.[2] But despite the foregoing, an ALTA Endorsement Form 14- type Future Advances endorsement will still be needed with respect to issues of validity, enforceability, and priority of such advances.

6. Elimination of Apportionment Clause in 2006 Owner's Policy. Conditions and Stipulations 8 in the 1992 policy has been deleted from the 2006 owner's policy. Under the 1992 policy, if there were multiple tracts insured under an owner's policy and the tracts were not used in conjunction with one another, then unless coverage amounts were specifically apportioned, coverage for each tract in the event of a loss was pro-rated based on the relative values at policy date.[3] Under a 2006 ALTA owner's form policy that insures multiple unrelated tracts, coverage is provided as though there is a separate owner's policy on each tract, with tie-in endorsements such that coverage on any one tract could be up to the full coverage amount of the policy.

7. Expanded affirmative coverage for items in Public Records. Covered Risks 5, 6, 7 and 8 are intended to affirmatively provide coverage for the "public records" exceptions which were contained in the 1992 Exclusions regarding governmental laws and regulations (including subdivision, zoning and environmental), the exercise of government police power, and the exercise of eminent domain rights. In other words, coverage is now expressly provided for such excluded matters if a notice thereof is recorded in the Public Records, as defined in the policy. It should be noted that the definition of "Public Records" in the 2006 forms is very broad and with respect to Covered Risks 5(d), the term shall include environmental protection liens filed in the records of the clerk of the United States District Court for the district where the Land is located. At the very least this increases the duty of the certifying attorney to consider checking the records of the U. S. District Court, especially in situations involving potential environmental risks such as dry cleaners or gas stations.

8. Affirmative survey coverage for encroachments onto adjoining land. Covered Risks 2(c) of the 2006 policy forms clarifies and expands on the survey coverage that was already implied in the 1992 forms. However, it also expressly provides coverage for any encroachment of existing improvements and onto adjoining property. Under the old forms, the definition of "land" was tied to the outer boundaries. As a result, numerous courts held that a title insurance policy did not provide coverage for encroachments off of the insured land, unless affirmatively stated. The new language automatically gives coverage for loss arising from such an encroachment, unless an adequate survey exception is taken.

9. Creditors' rights coverage enhanced. Covered Risks 9 (owner) and 13 (loan) of the 2006 policy forms provides for express affirmative coverage over two (2) types of creditors' rights risks. First, coverage is provided against any attack against the previous chain of title. Second, coverage is provided against any attack on the present insured transaction due to a failure to record (or failure of a recording to impart binding notice in a bankruptcy). This coverage was previously provided, in effect, through the exception to the creditors' rights Exclusion from Coverage.

10. Arbitration clause revised, enhanced. Under Conditions 14 (owner's) and 13 (loan) of the 2006 policy forms, arbitration may now be demanded by either party up to a $2,000,000 threshold, as opposed to $1,000,000 as in the 1992 policy. While most of the changes benefit the insured, this is an area that could arguably be considered less favorable (depending on your preference for or against arbitration).

11. No more automatic requirement of sworn proof of loss or production of original policy. The burden on the insured claimant in Conditions and Stipulations 4 of the 1992 policy requiring a proof of loss to automatically be given no longer exists in the 2006 policy. Instead, the Insurer must first attempt to determine the loss and, if it is unable to do so, may require the insured claimant to furnish a signed proof of loss. Additionally, under Conditions and Stipulations 12(a) (owner) and 11(a) (loan) of the 1992 policy forms, the requirement to produce the original policy in order to make a claim has been eliminated. However, though the process may be simplified, any delays or other actions which prejudice the ability of the title insurer to adequately address the claim may be grounds for denial of or mitigation of liability for the claimed loss.

12. Automatic increase in coverage amount if Company opts to litigate. Under Conditions 8 (Determination and Extent of Liability) of the 2006 policy form, if the title company pursues its rights under the policy to litigate a title issue in an attempt to cure a defect and loses, the Amount of Insurance is automatically increased by 10%. This is an attempt to help the insured by offsetting some of the damages not otherwise covered by the policy that could be sustained as the result of having to wait for the litigation to play out.

13. Conditions and Stipulation 10 (Liability Non-Cumulative) of the 1992 policy form has been deleted in the 2006 Loan Policy form. Clarification and enhancement of "aggregate liability" issue in loan policy. Under the old policy forms, coverage was automatically reduced by the amount of any claim paid to the same insured on another insured instrument (i.e. a prior deed of trust). This was problematic to holders of junior mortgages, as even a partial payment on a larger first mortgage could eliminate coverage for the junior lien altogether. This is no longer a concern.

14. Elimination of "Last Dollar" issue in 2006 Loan Policy. Conditions and Stipulations 9(b) of the 1992 loan policy provided that loan coverage was decreased dollar-for-dollar as partial payments were made to reduce the amount of outstanding indebtedness. In the case of an under-secured loan, this was interpreted to mean that coverage could be depleted even before the underlying indebtedness was paid in full. This deletion, therefore, eliminates the need for a "Last Dollar" endorsement, as there is no longer such an automatic reduction in coverage.

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[1] There are some cases outside of North Carolina which essentially hold that an exception to an exclusion, where no actual coverage is affirmatively provided, does not provide coverage (under Contract law). And this despite the old mathematics adage that a double-negative equals a positive! The new Covered Risks (and the corresponding elimination of exceptions to Exclusions from Coverage) resolve any judicial inconsistency, and make it clear to insureds that there is coverage, and no longer any need to rely on judicial interpretation. [2] Under Conditions and Stipulations 8(d) of the 1992 policy, such advances were only expressly covered if made to protect the lien of the insured mortgage and secured thereby or to prevent deterioration of improvements, or if such advances were obligatory construction advances. [3] In other words, if a $400,000 policy covered two separate tracts worth $200,000 each, and there is later a claim on one tract, coverage for that claim was limited to $200,000, even though the policy was for $400,000, and even though there could have been appreciation such that the tract was worth much more at the date of loss.

LEGISLATIVE CORNER

The latest on trusts in North Carolina:

Among other changes to the North Carolina Uniform Trust Code, Senate Bill 947, on-line at http://www.ncga.state.nc.us/Sessions/2007/Bills/Senate/HTML/S947v5.html, created a new statutory provision, N.C.G.S. 39-6.6, to "cure" conveyances to trust versus trustees, to wit:

§ 39 6.7. Construction of conveyances to or by trusts.
(a) A deed, will, beneficiary designation, or other instrument that purports to convey, devise, or otherwise transfer any ownership or security interest in real or personal property to a trust shall be deemed to be a transfer to the trustee or trustees of that trust.
(b) A deed or other instrument which purports to convey or otherwise transfer any ownership or security interest in real or personal property by a trust shall be deemed to be a transfer by the trustee or trustees of that trust. This rule of construction shall apply:
(1) Regardless of whether the instrument is signed by the trustee or trustees as such, or by the trustee or trustees purportedly for or on behalf of the trust; and
(2) Regardless of whether the instrument by which the trustee or trustees acquired title transferred that title to the trustee or trustees as such, or purportedly to the trust.
(c) A deed or other instrument by which the trustee or trustees of a trust convey or otherwise transfer any ownership or security interest in real or personal property shall be deemed sufficient:
(1) Regardless of whether the instrument is signed by the trustee or trustees as such, or by the trustee or trustees purportedly for or on behalf of the trust; and
(2) Regardless of whether the instrument by which the trustee or trustees acquired title transferred that title to the trustee or trustees as such, or purportedly to the trust.
(d) The trustee or trustees of a trust may convey or otherwise transfer any ownership or security interest in real or personal property as trustee or trustees even though the deed or instrument by which the trustee or trustees acquired title purported to convey or transfer that title to the trust.
(e) Nothing in this section shall be construed to limit the manner in which title to real or personal property may be conveyed or transferred to or by trustees.

This is another helpful provision in addition to the 2006 additions which the original Uniform Trust Code created, providing for protection of third party purchasers and lenders relying upon a Certificate of Trust pursuant to N.C.G.S. 36C-10-1013 et seq.