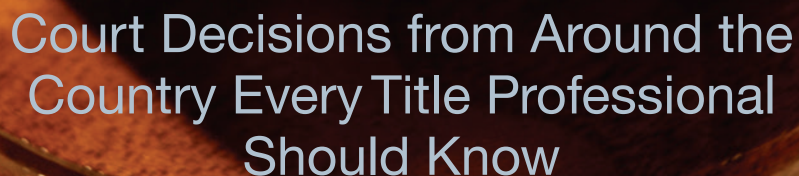
July 2012

TitleNews

Official Publication of the
American Land Title Association

Top Lawsuits Impacting the Title Industry



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July 14-16	Large Agents Meeting *Quebec City, Canada*
September 24	Agents & Abstracters Forum *Richmond, VA*
October 17-20	2012 Annual Convention *Colorado Springs, CO*

STATE MEETINGS

July 15-17	Michigan
August 1-4	Kansas
August 9-11	Pacific Northwest *(ID, MT, OR, UT, WA)*
August 10-11	Minnesota
September 9-12	New York
September 9-11	Ohio
September 12-15	Colorado
September 13-15	Dixie Land *(AL,GA,MS)*
September 13-15	North Carolina
September 19-21	Nebraska

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TitleNews is published monthly by the American Land Title Association, Washington, D.C. 20036. U.S. and Canadian subscription rates are $30 a year (member rate); $100 a year (nonmember rate). For subscription information, call 800-787-ALTA.

Send address changes to *TitleNews*, American Land Title Association, 1828 L Street, N.W., Suite 705, Washington, D.C. 20036.

Anyone is invited to contribute articles, reports, and photographs concerning issues of the title industry. The Association, however, reserves the right to edit all material submitted. Editorials and articles are not statements of Association policy and do not necessarily reflect the opinions of the editor or the Association.

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Paying Attention to Details—It's Important for What We Do

Our society is working and communicating more rapidly than ever. We are bombarded with information from the Internet, 24-hour television news and 140-character headlines from Twitter. According to a 2008 study by Lloyds TSB Insurance, our average attention span halved over the past decade from 12 to five minutes. That means I only have four and a half minutes to make my point in this letter before you move on. I think we all know that a short attention span hurts a person's attention to detail.

There was an interesting Wall Street Journal article about a mandatory "museum intervention" for all first-year medical students at Yale's School of Medicine. The Enhancing Observational Skills program asks students to look at and then describe Victorian artwork where people are the primary subject. The program seeks to improve doctor's diagnostic ability through their observation of the people in the artwork. It seems to be working. A three-year study published in the Journal of the American Medical Association showed that students who participated in the program are 10 percent more effective at diagnosis. The program has expanded to more than 20 medical schools, including Harvard, Columbia and Cornell. It has also become part of Wharton's executive education.

This month's cover article discussing the top lawsuits impacting the title insurance industry is a great opportunity to test this method of learning as a way to improve your work. We all get tunnel vision, focusing on the work on our desk and getting ready to complete the next transaction. However, as pointed out in the article, we need to look around, pay attention to the details and experience our own "museum intervention." Take some time and read the summaries of the court cases around the country. Members of ALTA's Title Counsel do a fabulous job boiling down the facts and explaining how the decisions reviewed may impact the industry. Understanding the decisions and seeing trends serves to protect your business from future changes.

Seeing the whole picture and the details contained in a picture is a great skill to develop. In fact, paying attention to the details is what this industry is all about. I think it's time for a trip to the National Gallery of Art!

– Michelle Korsmo, ALTA chief executive officer

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Minnesota, New York First State Partners of Title Action Network

The Minnesota and New York state land title associations became the first state partners in the Title Action Network, an energized movement of title professionals promoting the industry's value and protecting homeownership.

The title industry's advocacy efforts will be enhanced as additional states come aboard. The Title Action Network, which now has more than 1,000 members, provides states with advanced communications tools for grassroots advocacy at the state legislative level.

According to Bob Treuber, executive director for NYSLTA, the association's executive committee voted to join the Title Action Network because it was the next logical step in the development of its advocacy agenda. To have an effective voice, title professionals need a consistent presence in front of elected and appointed officials.

"In this market, title people are busier than ever, so we needed a tool that had the right combination of impact, speed and ease of use for our members," Treuber added. "The Title Action Network came along at the right time and it has all the features and controls we wanted to ensure that our members have the ability to speak to the people they elected."

The MLTA board of directors passed a motion on April 5, allowing the association to promote the Title Action Network at meetings and through its website. Richard Welshons, secretary/treasurer for MLTA, calls the Title Action Network a vehicle to advance grassroots advocacy at the state and national level, as well as a tool to drive membership.

"I encourage other state leaders to do the same to give our industry the loudest voice possible on matters that affect us daily," Welshons said.

If your state would like to partner with the Network, call ALTA at 202-296-3671. You can join at *www.alta.org/tan*.

TIPAC Honors 2011 Contributors

ALTA's Title Insurance Political Action Committee (TIPAC) honored several members who helped contribute to a record-setting campaign in 2011 that collected more than $300,000.

ALTA President Chris Abbinante praised John Voso, TIPAC chair, for the committee's success.

"Through John's efforts we've changed the face of TIPAC. Success takes leadership and we've been privileged to have John lead our TIPAC efforts," Abbinante said.

Voso quickly turned the praise to members of TIPAC, calling them an "all-star" group and thanking them for their team approach of helping TIPAC reach its goals.

2011 TIPAC Award Winners

- 2011 TIPAC Underwriter (most raised per market share): *John Voso, Old Republic Title Insurance Co./Ohio*
- 2011 Top TIPAC Donation by State Premium: *Karen Johner, North Dakota Guaranty & Title Co./North Dakota*
- 2011 TIPAC Agent Award (greatest amount raised): *Peter Griffiths, Land Title Guaranty Co./Colorado*
- 2011 Top Underwriter Award: *John Hollenbeck, First American Title Insurance Co./California*
- Outstanding State Award (most contributors): *Peter Griffiths, Land Title Guaranty Co./Colorado*
- 2011 Rookie of the Year: *Bill Burding, Orange Coast Title Co./California*
- 2011 Trustee of the Year: *Diane Calloway, Specialized Title Services/Georgia*

Through May 2012, TIPAC has raised $232,544 from 293 people. If you have any questions about TIPAC, contact Jessica McEwen at *jmcewen@alta.org*.

TITLE INDUSTRY
POLITICAL ACTION
COMMITTEE

Title Agents Implement Many Procedures and Controls to Thwart Escrow Theft

With regulators focused heavily on protecting consumers, it is important ALTA members explain the various tools that are used and processes that are followed to protect escrow funds. The following is an abbreviated list of various procedures and controls ALTA members follow to detect and mitigate escrow theft.

- **Escrow Documents and Files:** *Maintain filing and file storage systems that adequately safeguard escrow/closing files and escrow records. Implement a document retention program that complies with applicable federal and state law, as well as underwriter guidelines.*
- **Information Technology:** *Limit access to computers or software modules used to generate escrow receipts and disbursements. Use stand-alone computers for online banking and wire transfers. Protect IT equipment from computer hacking and cybercrime.*
- **Financial Statements:** *Maintain up-to-date financial statements and immediately provide to underwriter(s) upon request.*
- **Accounting Processes:** *Ensure the appropriate level of internal controls and management oversight including segregation of duties and accounts.*
    - Require closing files to have an accounting ledger/disbursement sheet that lists all receipts and disbursements with adequate level of detail including an ending balance.
    - Ensure signed settlement statements agree with receipts and disbursements in each closing file.
- **Escrow Reconciliation:** *Ensure that receipts and disbursements are properly entered into the accounting system and that bank records and accounting records reconcile.*
    - Post deposits and disbursements to the individual closing file during the work day.
    - Prepare a monthly escrow trial balance for each escrow account listing all open escrows.
    - Perform a monthly three-way reconciliation of bank balance, book balance (journal, checkbook register) and escrow trial balance for each escrow bank account within 45 days from the closing date of the bank statement.
    - Research and immediately resolve any outstanding deposits and checks.
    - Require reimbursement of any escrow receivable or shortage by the appropriate party or from the escrow agent's operating account within 45 days from the date of the bank statement reflecting the transaction creating the receivable or shortage.
    - Require management approval for the voiding and reissue of any outstanding checks.
    - Submit monthly reconciliations to underwriter(s) upon request, as required by statute or by agency agreement.
- **Escrow Processes:** *Design accounting processes with the appropriate level of internal controls and management oversight, including business processes to segregate duties.*
    - Utilize effective internal controls over all incoming and outgoing funds, including wire transfers.
    - Ensure that bank accounts used for closings be "escrow" or "trust" accounts, with "escrow account" or "trust account" appearing in the signed bank agreement, on the bank statement and on disbursement checks and deposit slips.
    - Require written management approval for transfers of funds between escrow/closing files and between escrow accounts.
    - Allow disbursements to be made only after "good funds" (according to the state law or regulation) have been established.
    - When available, use positive pay, reverse pay or other authentication process or system to verify checks before payment by the escrow bank.
    - Ensure that funds held after closing are held and disbursed in accordance with a written escrow agreement executed by the appropriate parties, and that underwriter approval is obtained if funds are being held in connection with an outstanding title matter.
    - Require authorization from two persons to transmit funds by wire, one to initiate the wire and another to authorize and validate the transfer.
    - Ensure the recording of documents related to escrow/closing transactions in a timely manner.

For more, check out ALTA's "*Standards Procedures and Controls"* at www.alta.org. Compile a list of steps you follow. Share with regulators, customers and consumers.

NAIC Names New Staff Liaison to Title Insurance Task Force

The National Association of Insurance Commissioners (NAIC) has a new staff liaison representing the association for its Title Insurance Task Force, which studies issues related to title insurers and title insurance producers.

Aaron Brandenburg took over the role as Joe Bieniek, who served as the NAIC's senior regulatory services advisor, left to take a private sector position. While new to his role, Brandenburg is encouraged by the industry's engagement on key issues.

"From what I've seen so far, ALTA does a great job of participating in discussions and in reaching out to regulators to find out what they need from the industry," said Brandenburg, who is an economist and statistical information manager for the NAIC. "I hope we continue to have strong communication with ALTA and make sure we have the same goals."

Bruce Ramge, director of the Nebraska Department of Insurance, serves as chair of the Title Insurance Task Force and Market Conduct Examination Standards Working Group. He said one of the Task Force's major initiatives is the development of a white paper examining ways to mitigate escrow theft. A draft of the white paper is expected to be available for public comment later this year. ALTA provided a suggested outline for the NAIC's paper. According to Ramge, the NAIC also will focus on solvency, risk-based capital requirements for title insurers; the feasibility of promoting effective consumer shopping for title agents and insurers; and consider developing best practices for the design and implementation of title cost comparison guides for consumers.

Brandenburg, who has been with the NAIC for more than six years, conducts economic and statistical research for the NAIC and its members on a wide range of issues. He has assisted in the authoring of several NAIC publications, given presentations to numerous insurance-related groups and provided support for several NAIC Working Groups. He also oversees the Statistical Information Unit at the NAIC, which is responsible for publishing numerous statistical reports and responds to various insurance-related requests from state and federal officials, academics, media and industry. Brandenburg earned his Bachelor of Science in Economics and Bachelor of Arts in History from the University of Iowa and his Master of Arts in Economics from the University of Missouri–Kansas City.

Diane Evans, a member of ALTA's Board of Governors and a member of the Liaison Committee with the NAIC, appreciated Bieniek's willingness to listen to industry input and concerns, and is hopeful the mutual relationship that has been fostered continues.

"Joe developed a great understanding of the title insurance industry," she said. "He really became a conduit for discussion between the industry and regulators. We hope to continue that relationship as Aaron takes over responsibility of being the NAIC staff liaison, enabling us to continue working together to find solutions that benefit consumers and the industry."

Call for ALTA Committee Volunteers Closes July 27

ALTA is only as strong as the participation of its membership, and once again, we have a fabulous opportunity to continue cultivating support for our valued committee as ALTA's call for committee volunteers is now open.

If you have a special area of expertise (real property records, claims, international development or industry technology, for example), or if you have a special area of interest (such as membership, government affairs, public relations, research or employee and professional education, to name a few), there is a committee on which you can volunteer to serve. ALTA has 27 committees for you to consider.

The ALTA president-elect makes all committee appointments in the late summer for a term beginning after the Annual Convention in October. The deadline to submit your name is July 27.

It is easy to volunteer. All you need to do is contact Taylor Morris at *tmorris@alta.org* or 202-296-3671. You can see all of the committees and their responsibilities at *www.alta.org/about/commserv.cfm*.

Top Lawsuits Impacting the Title Industry

Court Decisions from Around the Country Every Title Professional Should Know

It's said that nothing is certain but taxes and death. Lawsuits can probably be added to that list. A bevy of court decisions handed down over the past year could severely impact the title insurance industry. To keep members abreast of what's happening in court rooms across the country, ALTA's Title Counsel Committee members provided a synopsis of 10 lawsuits they believe have significant ramifications on the title insurance industry. They've also provided a short summary of six additional cases that have relevance to the industry. >>

By Jeremy Yohe

The Title Counsel met at ALTA's Federal Conference in May and reviewed nearly a hundred lawsuits. The following are summaries of the Top 10 cases the Title Counsel believes have the most relevance to the title insurance industry. Cases range from issues dealing with agency agreements and marketability of title to involuntary conveyances and equitable subrogation. Members of the Title Counsel providing the summaries include Marjorie Bardwell of Fidelity National Title Group and chair of Title Counsel; Edward Hellewell of Stewart Title Guaranty Co.; Rich Carlston of Miller Starr Regalia; Ella Gower of Miller Starr Regalia; Bruce Davis of Bean, Kinney & Korman; Christopher Smart of Carlton Fields; Stephen Gregory of Steptoe & Johnson; Lance R. Pomerantz of Land Title Law; and Giancarlo Spolidoro of Glaser Weil Fink Jacobs Howard Avchen & Shapiro.

"While these decisions may not be in your particular jurisdiction, they have the potential to be used as examples for courts in other areas," Bardwell said. "All title professionals should understand the implications of these decisions because they could indicate a trend in the interpretation of these legal issues. If agents and underwriters are unaware of these outcomes, their operations could be potentially vulnerable to unsuspected liabilities."

In no particular order, the following are summaries of the facts from the lawsuits, the courts' decision and the cases' relevance to the title insurance industry.

AT&T Mobility LLC v. Vincent Concepcion ET UX

131 S. Ct. 1740, 2011 U.S. Lexis 3367 (Supreme Court of the United States 2011, Case 09-893)

Facts: The contract between Concepcion and AT&T provided for arbitration of all disputes. The Concepcions brought a putative class action suit against AT&T in federal district court, alleging false advertising and fraud for charging sales tax on "free phones." The federal district court denied AT&T's motion to compel arbitration, and the United States Court of Appeals for the Ninth Circuit affirmed. The Supreme Court agreed to hear an appeal.

Holding: The contract between the Concepcions and AT&T established dispute proceedings and provided for arbitration of all unresolved disputes but the contract precluded class arbitration. The Ninth Circuit found that the arbitration provision was unconscionable under California's rules, which provided that class-action waivers in consumer contracts of adhesion were unconscionable in cases where a party with superior bargaining power was alleged to have cheated large numbers of consumers out of individually small sums of money.

The U.S. Supreme Court held that the Federal Arbitration Act (FAA) preempted the California rule. Nothing in the FAA suggested an intent to preserve state law or rules that stood as an obstacle to the accomplishment of the FAA's objectives. The overarching goal of the FAA was to ensure the enforcement of arbitration agreements according to their terms to facilitate streamlined proceedings, and requiring the availability of class arbitration was inconsistent with the FAA. The Ninth Circuit's judgment was reversed and remanded for further proceedings consistent with the Supreme Court's decision.

Relevance to the Title Industry: Arbitration provisions are found in ALTA policies. Occasionally, states have prohibited or limited those provisions. This case is relevant because it may serve as a resource for the industry to counter state efforts to prohibit or limit the use of arbitration.

Edward Hellewell is senior vice president and underwriting counsel for Stewart Title Guaranty Co. and can be reached at *ehellewe@stewart.com*.

Chicago Title Insurance Co. v. Washington State Office of the Insurance Commissioner

(2012) 271 P.3d 373

Facts: Chicago Title Insurance Co. entered into an issuing agency agreement with Land Title Insurance. Chicago Title did not compensate Land Title for marketing expenses and did not exercise any control over Land Title's marketing practices or procedures. In 2007, Land Title was investigated for violations of Washington's anti-inducement regulation. After concluding the investigation, the Washington Office of the Insurance Commissioner ("OIC") sought to have Chicago Title stipulate that Land Title's conduct violated the regulation, pay a fine, and submit a compliance plan with which Chicago Title would be required to comply. Chicago Title refused. An hearing was held before an administrative law judge, seeking to hold Chicago Title responsible for the alleged violations, committed solely by Land Title. Summary judgment was granted in favor of Chicago Title on the

issue of vicarious liability. The OIC petitioned to the OIC hearings unit for review and reversed the summary judgment decision and held that Chicago Title was vicariously liable under a strict common law analysis including actual and apparent authority. Chicago Title petitioned for review and the superior court upheld the OIC's decision. Chicago Title appealed.

Holding: The Court of Appeal reinstated the grant of summary judgment for Chicago Title. It held that, under its agency agreement and in practice Chicago Title did not exercise control over Land Title's marketing practices and, accordingly, was not vicariously liable or liable under the doctrine of apparent authority.

Relevance to the Title Industry: This case serves as a reminder that agency agreements must be carefully drafted, specifically as they relate to marketing, to avoid any unintended consequences that could result from activities by an agent.

Richard Carlston is an attorney with the law firm Miller Starr Regalia and can be reached at *richard.carlston@msrlegal.com*.

Hart, et al. vs. Ticor Title Insurance Co.

126 Haw. 448, 272 P.3d 1215 (2012)

Facts: The Harts owned two adjoining parcels in Honolulu, Hawaii. They had obtained fee insurance from Ticor Title Insurance Co. at the time of purchase. Later, they applied to the land court to register and consolidate both parcels into one. In response to the application, Hawaii filed an answer that contained a pro forma defense that "the State reserves any interest in the property that may have escheated to the state." No other facts concerning an escheat were ever cited in the proceeding. In fact, the state later filed a memorandum with the land court stating that "the State is not pursuing any claim of escheat to the State." The registration proceeding was then concluded in due course.

In the coverage litigation, both the trial court and the intermediate appellate court found that Ticor had no duty to defend because the defense was "routine" and "did not create a realistic or reasonable potential for coverage." In addition, there was evidence that the Harts' counsel expended no time in defending the escheat allegation.

Holding: The Supreme Court of Hawaii determined that "because a mere potential for coverage existed under the policy," Ticor was obligated to defend against the escheat "claim." Accordingly, the court remanded the case to the trial court to determine the amount of attorney's fees and costs to be awarded to the Harts.

Relevance to the Title Industry: This appears to be the first reported case on these facts anywhere in the nation. While it arose in the context of a land registration proceeding, there are many instances of land litigation to which state or municipal agencies are necessary parties. Pro forma answers or allegations are commonplace in these proceedings. The rationale of this decision, if it takes hold in other states, could open the floodgates to title coverage litigation over completely baseless allegations.

Lance R. Pomerantz of Land Title Law can be reached at *lance@LandTitleLaw.com.*

Title Counsel

The purpose and scope of work of ALTA's Title Counsel is to promote the exchange of information within the ALTA membership about current developments in the law affecting title insurance and conveyancing.

If you are interested in joining Title Counsel or submitting a case summary relevant to the title insurance industry, please contact Steve Gottheim, ALTA's regulatory and legislative counsel, at *sgottheim@alta.org*.

J.P. Morgan Chase Bank, N.A. v. First American Title Insurance Co.

2011 WL 5075669 (E.D. Mich. October 26, 2011).

Facts: First American discovered that its agent, Patriot Title, fraudulently procured and closed a loan transaction in which the lender, WaMu, was provided with a closing protection letter (CPL) and issued a lender's policy. The FDIC was appointed receiver for WaMu and sold WaMu's assets, including the loan in question, to J.P. Morgan. First American obtained and then tendered title to the property to J.P. Morgan in order to cut off any claims J.P. Morgan might have under the policy. Although J.P. Morgan rejected this tender and filed suit, the court ultimately held that by tendering title, First American established title as insured and performed its obligations under the policy. The FDIC then moved to intervene, claiming that, although the loan, and therefore the policy, had been transferred to J.P. Morgan, the FDIC had retained the claim under the CPL and, as a result,

was entitled to recover under the CPL, despite the fact that the court had already determined that First American had no further obligations under the policy. The FDIC and J.P. Morgan stipulated that the CPL claim had not been transferred to J.P. Morgan as part of the sale of the WaMu mortgage loan. The FDIC claimed that, in selling the loan to J.P. Morgan, it had reduced the book value of the loan from $4,543,593.07 to $2,772,000, as a result of its discovery of the fraud. The FDIC thus sought from First American the difference between the book value and the original amount of the loan. First American argued the FDIC lacked standing to bring a claim under the CPL because the CPL was integrated with the policy and could not be severed from it. It also argued the FDIC had no actual loss because WaMu was negligent in making the loan and because any reduction in the value of the sale of the loan was of its own making and not due to the fraud. First American also raised as a defense that it had been prejudiced because of the FDIC's late notice. First American also said its subrogation rights were impaired due to the sale of the loan, and, with it, any claim to a deficiency judgment to J.P. Morgan. First American also argued it was entitled to a $2,106,056.27 credit because Patriot Title had in fact used that amount of loan proceeds to acquire title to the property, although not in the name of WaMu's borrower.

Holding: The Michigan federal court found that consideration for the CPL was WaMu's purchase of the policy, but that the CPL was not integrated into the policy because the indemnification obligations under each instrument were distinct. The court found the consideration for the CPL did not evaporate because the FDIC sold the loan and the policy to J.P. Morgan. Because the FDIC had sold the loan at a loss attributable to Patriot Title's fraud, the court held that the FDIC continued to have a significant interest in the underlying transaction and standing to make the claim under the CPL. The court rejected First American's argument that the loss was attributable to the FDIC's sale of the loan at a discount and instead held that Patriot Title's fraud was the direct cause of the loss. It also rejected First American's argument that WaMu's negligence in making the loan could allow First American to avoid its indemnification obligations under the CPL, holding that WaMu's negligence was irrelevant. The court further rejected the arguments that First American was prejudiced by the alleged late notice and impairment of its subrogation rights. The court said First American knew of Patriot Title's fraud before WaMu did. It also found that the FDIC's sale of the loan, and, with it, the right to seek a deficiency, did not impair First American's subrogation rights under the CPL. Finally, the court rejected the claim that First American was entitled to a credit for the amount of the loan proceeds actually applied to acquire title to the property. As the entire transaction was a fraud and Patriot Title had mishandled the loan proceeds, the court held that the starting point for the FDIC's actual loss under the CPL was the full amount of the loan.

> While the court's decision in J.P. Morgan v. First American is limited to the facts in the case, it lays out the potential extent of an insurer's liability under a policy and CPL.

Relevance to the Title Industry: While these opinions on the FDIC's CPL claim are likely limited to the unique facts and procedural posture of this case, the industry should take notice because they lay out in detail the full potential extent of an insurer's liability under a policy and CPL. If courts begin to allow CPLs to be separated from the mortgage loans and policies in connection with which they were issued, then insurers may end up bearing the burden of a significant number of problem loans made by failed banks that have passed through the FDIC. The fact that the court refused to consider the original lender's negligence is particularly troubling in this instance because the lender's underwriting practices were likely a contributing factor to its failure and the reason the FDIC was appointed a receiver in the first place. While title insurers clearly agree to assume certain liability for

their agent's actions under CPLs, it is unclear if CPLs were designed as a substitute for a lender's loan underwriting and to shift the entire risk of making risky loans to the title insurer.

Christopher Smart is an attorney with the law firm Carlton Fields and can be reached at *csmart@carltonfields.com*.

In re: Mark Stanley Miller et al v. Deutsche Bank National Trust Co.

(Case 11-1232, U.S. Court of Appeals, Tenth Circuit, 02/01/2012)

Facts: In 2006, the Millers executed a promissory note (Note) in favor of IndyMac Bank, F.S.B. (IndyMac) which was secured by a deed of trust on Colorado real estate. The deed of trust identified Mortgage Electronic Registration Systems, Inc. (MERS), acting as a nominee for IndyMac, as its beneficiary. In 2010, Deutsche Bank National Trust Co., claiming to be the current holder of the note based on an indorsement of the note in blank, filed a foreclosure action alleging the Millers had failed to make the required payments. A copy of the note was attached to the foreclosure pleadings. The Millers filed a Chapter 13 bankruptcy petition and the automatic stay halted the foreclosure. Deutsche Bank obtained an order relieving it from the stay which permitted the foreclosure to continue. The Tenth Circuit Bankruptcy Appellate Panel affirmed the bankruptcy court's order granting Deutsche Bank relief from the automatic stay. The Millers appealed.

Holding: The Tenth Circuit Court of Appeals identified the issue on appeal as being whether Deutsche Bank established that it was a party in interest entitled to seek and obtain relief from the stay. A party in interest must be either a creditor or a debtor of the bankruptcy estate. A creditor includes an entity that has a claim against the bankruptcy debtor. A claim is a right to payment. The Tenth Circuit applied Colorado property rights law and the Colorado Uniform Commercial Code in analyzing the facts. When endorsed in blank, an instrument becomes payable to bearer and may be negotiated by transfer of possession. In the case of bearer paper such as the note, physical possession is essential because it constitutes proof of ownership and a consequent right to payment. Deutsche Bank offered no proof that it obtained physical possession of the original note. The Tenth Circuit held that Deutsche Bank failed to establish that it is a party in interest. The judgment of the Bankruptcy Appellate Panel was reversed and remanded for proceedings in accordance with the opinion.

Relevance to the Title Industry: Mortgage foreclosures and the involvement of MERS impact the title to land and as a result, the title industry. This case is a reminder to title insurance professionals of that fact, and the importance of familiarity with the decisions of the courts that are appropriate to the land that is the subject of foreclosure, and ultimately the subject of subsequent conveyances, mortgages and title insurance policies.

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Dollinger DeAnza Associates v. Chicago Title Insurance Company

(2011) 199 Cal.App.4th 1132

Fact: Dollinger DeAnza Associates purchased property in Cupertino believing that it was divided into seven parcels. Dollinger intended to sell parcel seven. Dollinger obtained a title insurance policy from Chicago Title Insurance Co. Dollinger entered into an agreement to sell parcel seven, however, the purchaser withdrew after learning that an (arguably void) notice of merger had been recorded, which stated that all seven parcels were merged into a single parcel. The notice of merger was not listed as an exception in Dollinger's policy. Dollinger filed a claim under its policy, and eventually filed suit against Chicago Title. Chicago Title filed a motion for summary judgment (or in the alternative summary adjudication), arguing that Dollinger could not establish a breach of contract cause of action (and related breach of covenant of good faith and fair dealing) because the policy did not cover Dollinger's claim. The trial court granted Chicago Title's summary judgment motion finding the Notice of Merger was void (as it was not indexed under the proper name) and that the notice of merger did not affect the marketability of Dollinger's title. Dollinger appealed.

Holding: The Court of Appeal upheld the trial court's granting of summary judgment. It noted that while the notice of merger at issue may impact Dollinger's ability to market parcel seven, the notice of merger had no affect on Dollinger's title to parcel seven. Under the policy, coverage was expressly limited to "a matter affecting title to the

land," and Dollinger's claim did not fall within the coverage.

Relevance to the Title Industry: This case serves as a good source for analysis of the marketability of title.

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Sourcecorp, Inc. v. Norcutt

2012 Ariz. LEXIS 120 (Ariz. Apr. 25, 2012)

Facts: The Norcutts bought a home for cash, paying $621,000 to satisfy the existing first mortgage in the process. They later discovered that a $3 million junior judgment lien had been recorded against the house by Sourcecorp. Sourcecorp initiated a sheriff's sale of the house, which the Norcutts sued to enjoin.

Holding: The Supreme Court of Arizona adopted the restatement approach to equitable subrogation and held that the Norcutts were equitably subrogated to the same priority as the first mortgage in the amount that the Norcutts paid to satisfy the $621,000 mortgage. The Nortcutts, however, were not entitled to foreclose on their priority interest. Rather, the court ruled that the Norcutts were entitled to priority to the proceeds of any sale in the amount they paid to satisfy the prior $621,000 mortgage.

Relevance to the Title Industry: As the number of all cash short-sales increases, Sourcecorp provides authority for extending equitable subrogation to short-sale situations. This is particularly important in light of many underwriters' practices requiring that title be checked only through the prior mortgage. In such situations, when a claim is made because of an intervening lien, equitable subrogation may be available to reduce the potential indemnity exposure of an underwriter issuing owners policies to a short-sale purchaser.

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Home Federal Saving Bank v. Ticor Title Ins. Co.

2011 U.S. Dist. LEXIS 110367 (S.D. Ind.)

Facts: Ticor Title Insurance Co. issued a policy to Home Federal Saving Bank for a commercial construction loan. An endorsement to the policy insured Home Federal against mechanics' liens. A mechanics' lien arose because the borrower terminated the project's general contractor, and Home Federal refused to advance loan funds to pay for the general contractor's work. Home Federal then filed a policy claim, which Ticor denied. Ticor based the denial on the policy's Exclusion 3 (a), which excludes coverage of matters "created, suffered, assumed or agreed to" by the insured claimant. This exclusion usually is a good defense to a mechanics' lien claim arising when an insured lender does not fund a construction loan.

Holding: After settling with the general contractor, Home Federal sued Ticor to recover the cost of the settlement plus Home Federal's legal defense costs. Home Federal said that the policy's mechanics' lien endorsement precluded an Exclusion 3 (a) defense. The mechanics' lien endorsement began with the words: "Anything contained in said policy to the contrary notwithstanding … ." Home Federal argued that these words meant Exclusion 3 (a) did not apply to a claim under the mechanics' lien endorsement. The court disagreed with Home Federal and ruled for Ticor because the endorsement concluded with the words: "This endorsement is made a part of the policy or commitment and is subject to all the terms and provisions thereof … ." The court held this language meant the endorsement was subject to the basic policy's provisions, including the exclusions.

Relevance to the Title Industry: ALTA's standard endorsement forms provide that the endorsements are subject to the policy's provisions. The Home Federal case provides authority that this language is effective and enforceable. Thus, the policy's conditions and exclusions apply to an endorsement, although the endorsement may cover title risks not covered by the basic policy. This case also illustrates that an endorsement may expose a title insurer to unintended risks if the endorsement can be read as overriding basic policy provisions.

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Suntrust Bank,N.A., et al, v. Northen

433 B.R. 532, USDC, Middle District North Carolina, 2010

Facts: Orange County, N.C., maintains a Parcel Identification Number (PIN) index for its land records, pursuant to a state statute. The county has continued its grantor/grantee index as well, but the official index is by PIN.

In 1999, John G. McCormick secured a loan with Suntrust's predecessor with two tracts in Orange County. Although the deed

of trust included both parcels, only one PIN (Tract II) was listed on the instrument, and the PIN index reflected only one secured property. The grantor/grantee index, however, correctly listed both tracts.

In 2004, McCormick executed a deed of trust in favor of plaintiffs, securing parts of Tract I, which by then had been subdivided. This deed of trust was correctly listed in both the PIN index and the grantor/ grantee index.

McCormick was thrown into an involuntary bankruptcy in 2006, and the trustee, Northen, sold the property, transferring any liens to the proceeds. Northen then moved to avoid the Suntrust lien on the grounds that the trustee's status as a statutory bona fide purchaser gave the trustee no notice of the unindexed Tract under the deed of trust. Suntrust argued that the trustee had constructive (if not actual) knowledge of the lien against Tract I, and that a search of all public records—including the grantor/ grantee index—would have revealed Suntrust's lien.

Holding: In this case, the court found that the Northen lights outshone the Sun—trust me. A bona fide purchaser is only required to search the official records; to require otherwise would render the statute, and the PIN index, meaningless. Because Parcel I was not officially indexed, the trustee did not have actual notice of the lien and it could therefore be avoided in the bankruptcy proceeding. The actual knowledge of the trustee of any competing interest does not prevent the Trustee from asserting the rights of a hypothetical BFP.

Relevance to the Title Industry: Notice is always critical to the rights of successors in title, not only in bankruptcy proceedings, but in tax sales, foreclosures and other involuntary transfers (c.f. e.g., *Jones v. Flowers*, 547 US 220 (2006)). Any agent insuring a transaction from an involuntary conveyance should satisfy that the appropriate statutory notices were duly provided to all entitled to them, or an exception inserted into the policy.

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Premier Tierra Holdings, Inc. v. Ticor Title Ins. Co. of Florida, Inc.

No. 4:09-02872, 2011 WL 2313206 (S.D. Tex. June 9, 2011)

Facts: Premier Tierra, an insured lender, filed a claim with Ticor under its loan policy due to two defects in title, an incorrect legal description and a missing 50 percent interest as to the insured property. Six months went by and Premier Tierra filed suit against Ticor, which moved to abate the litigation to allow it to cure the defects in title. The court granted the motion and Ticor cured the missing 50 percent interest by obtaining a quit claim deed and then filed an action to reform the legal description and cured title. Ticor took the position that because it had cured title it had satisfied its obligations under the policy. Premier Tierra disagreed and amended its complaint claiming that Ticor breached its duty to cure title with reasonable diligence. Ticor moved to dismiss on the ground that it had satisfied its obligations under the policy by curing title through litigation. The court converted the motion to dismiss to a motion for summary judgment.

Holding: Interpreting Florida law, the United States District Court for the Southern District of Texas held that, read together, Sections 4(b), 8(a) and 8(b) of the policy were ambiguous and that, even though Ticor cured title through litigation and it was protected during the pendency of the action under Section 4(b), there were material issues of fact as to whether it breached its duty to cure title in a reasonably diligent manner both as to the defect cured by non-litigation means (the quit claim deed) and for time prior to the litigation being filed. Moreover, the court also rejected Ticor's argument that Premier Tierra could not prove damages under the policy because its damages were limited by Section 7. It held that, to the extent an insurer breaches a policy, it may not require the insured to comply with the other terms of the policy, like the limitation on liability.

Relevance to the industry: The Premier Tierra contains two important cautionary lessons. The first is that if an insurer intends to exercise its rights under a policy to cure title, it must act diligently in doing so. The second is that some courts (incorrectly, in the author's view) may strip away the limitations on liability under the policy where there is a determination that the insurer breached its duty to the insured.

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A Six Pack of Cases for the Road

Here's a Quick Review of a Few More Cases Impacting the Title Insurance Industry

In Re Caine

Case 1:10-bk-762969 US Bankruptcy Ct for the Western District of Arkansas, Filed 12/08/1

In this bankruptcy action the debtor-in-possession (DIP) sought to strip the mortgage of its secured status because of a defective legal description (it had one line omitted). Section 11 USC 544 (a) (3) gives the trustee (or in this case the DIP) the status of a bona-fide purchaser without actual notice (even if they have actual notice, which of course they do because they executed the mortgage).

The court allowed the mortgage to be considered unsecured, holding that constructive notice, not actual or inquiry notice, is all that a DIP is bound by. The mortgage did not give constructive notice because of the defect, even though the mortgage was readily "findable" by use of the grantor/grantee index or the searching of a prudent title professional. It allows the DIP to ignore any mortgage that is not perfect in form, even if under state law one would be put on notice with an obligation to inquire further if the defect was minor, such as this one.

Columbia Town Center v. 100 Investment Limited Partnership

2012 WL 335848, filed 2/2/12

A small parcel of land was conveyed out, and then included in a later conveyance of a much larger parcel by accident. Both transactions had title insurance issued by agents. The second grantee further conveyed, and when the error was discovered, it purchased the property and conveyed it to its buyer. It then made a claim and sued the agents and title underwriter for negligent searching. The agents were no longer in business and the insured was attempting to have the court find the underwriter liable for the negligence, since the underwriter had claimed the insured had voided coverage because it volunteered to buy the property when it had no liability under its special warranty deed. The court of appeals found there was no cause of action in tort. The underwriter was not vicariously liable for the negligently preformed searches.

Clickner v. Magothy River Assn., Inc.

424 MD 253 Court of Appeals of Maryland (35 A3d 464), Filed 1/10/12

Use by the public of an unimproved beach on a privately owned river island was found to be permissive under a "woodlands" exception to the general presumption of adverse use in Maryland.

If wild or uncultivated, as this beach was, the presumption is public use is permissive above the ordinary high water mark, which is the dry sand part of the beach. Owners put up a fence at or above the ordinary high water mark and were sued by a group of individuals and an organization attempting to burden the beach with a proscriptive easement to benefit the public. Although these rights are a state law issue, the case provides a good discussion of public versus private rights and adverse versus permissive use.

In Re Agard

Adversary Case no. 2:11-cv-01826(JS) US District Court E.D. of New York Bankruptcy case 8-10-777338(REG)

The portion of a bankruptcy court decision that discussed the hypothetical question of whether the lender had standing in a case involving a foreclosure where MERS was involved was an improper advisory opinion and was stricken and vacated.

The appeals court held that the lower court should not have discussed the legal issue since that particular question was not on appeal. The issue of the lender's standing was not objected to at the original foreclosure, and therefore the judgment of foreclosure was final.

Welk v. GMAC Mortgage, LLC

Case no. 11-CV-2676 (PJS/JJK) District Court of Minnesota, Filed 3/29/12

The court imposed a sanction of $50,000 on an attorney who, despite having lost on the same basis at all levels of the court system in Minnesota, including the U.S. Court of Appeals for the Eighth Circuit, continues to bring what the court calls "show-me-the-note" challenges to foreclosures.

The claim that the party holding the mortgage of record cannot foreclose non-judicially in Minnesota if they do not concurrently have possession of the note has been rejected in numerous cases within that state.

The attorney attracts clients through a website, at times rearranging client names so that the captions appear to be different when in fact they have the same group of plaintiffs.

As the cases drag on, he collects fees from his clients while they live rent free in their homes. The sanctions also included the payment of part of the defendant's legal fees. Wonder if it will stop him?

Western Mohegan Tribe & Nation of New York

Case No. 1:12-09292 US Bankruptcy Ct for the Northern District of IL, Commenced 3/19/12

Although this case is just starting, it is being closely watched to see if the court answers the basic question of whether a tribe can even file for bankruptcy.

It would appear they do not fall within the definitions of parties that have standing to file.

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Timeline and ALTA Advocacy on CFPB's New Mortgage Disclosures

Highlights of ALTA's Work Over the Past Four Years as Regulators Continue to Modify HUD-1

It's been only two years since the industry adapted to the last round of RESPA reform. But the title insurance industry will once again contend with a new GFE and HUD-1 as the Consumer Financial Protection Bureau (CFPB) is creating new mortgage disclosures.

A little more than a year ago, the CFPB launched its "Know Before You Owe" program to fulfill its mandate under Dodd-Frank to propose new mortgage disclosures. After several iterations of the initial Loan Estimate (which will replace the GFE and initial TIL) and Settlement Disclosure Form (which will replace the HUD-1 and final TIL), the CFPB is poised to release its proposed forms and regulations this month.

Since the 2008 RESPA Reform, ALTA has consistently advocated for its members. Four years ago, ALTA and its RESPA Task Force successfully had a proposed closing script removed from the final rule. Now, ALTA is hard at work again protecting members' interests.

Here's a look at some important upcoming dates, along with a recap of CFPB's endeavor to create new mortgage disclosures, the 2008 RESPA Reform and ALTA's advocacy efforts on behalf of the title insurance industry over the past four years.

2008

- **March 14:** HUD proposes new RESPA reform
- **May 22:** ALTA testifies before the House Small Business Committee
- **Nov. 12:** ALTA comments on RESPA revision
- **Nov. 12:** HUD Finalizes RESPA Rule
- **Dec. 3:** ALTA hosts webinar on New RESPA Rule

2009

- **Dec. 10:** The ALTA RESPA Task Force publishes Uniform Supplemental HUD-1/1-A Instructions

2010

- **Jan. 1:** HUD RESPA Rule becomes effective
- **July 13:** ALTA RESPA Task Force Updates Uniform Supplemental HUD-1/1-A Instructions in an editable PDF file format
- **July 21:** President Obama signs Dodd-Frank into law. Provision requires the Consumer Financial Protection Bureau to integrate TILA mortgage disclosures and RESPA's Good Faith Estimate and HUD-1 Settlement Statement
- **November 2010:** ALTA suggestion to correct issues surrounding line 1101
- **November 2010:** ALTA letter to HUD seeking guidance on GFE/HUD-1

2011

- **May-October:** CFPB develops Loan Estimate to replace TILA's Early Truth in Lending Disclosure and RESPA's Good Faith Estimate.
- **May 17:** ALTA participates in a CFPB-hosted joint trade association meeting on the first draft of application stage (GFE) mortgage disclosure
- **May 18:** CFPB issues first draft of application stage (GFE) mortgage disclosure
- **June 27:** ALTA letter to CFPB on first draft of application state mortgage disclosure
- **June 27:** CFPB issues second

draft of application stage (GFE) mortgage disclosure

- **July 11:** ALTA testifies before Congress on mortgage origination
- **July 21:** RESPA enforcement authority transfers from HUD to CFPB
- **July 29:** CFPB issues third draft of application stage (GFE) mortgage disclosure
- **Aug. 18:** ALTA participates in a CFPB-hosted joint trade association meeting on the third draft of application stage (GFE) mortgage disclosure
- **Sept.12:** CFPB issues fourth draft of application stage (GFE) mortgage disclosure
- **Sept. 22:** ALTA letter to CFPB offering input on how to improve disclosures and consumer understanding of fees
- **Oct. 5:** ALTA RESPA Task Force conference call with CFPB staff
- **Nov. 7:** ALTA participates in a CFPB-hosted joint trade association meeting on Settlement Disclosure to replace HUD-1
- **Nov. 8:** ALTA email to CFPB on fifth round of application stage (GFE) mortgage disclosure
- **Nov. 22:** CFPB releases first draft of Settlement Disclosure to replace HUD-1
- **Dec. 5:** ALTA letter to CFPB on first round of Settlement Disclosure to replace HUD-1
- **Dec. 6:** ALTA RESPA Task Force meets with CFPB staff
- **Dec. 23:** ALTA letter to CFPB on second round of Settlement Disclosure to replace HUD-1

2012

- **Jan. 27:** Joint trade association letter to CFPB Director Richard Cordray
- **Jan. 31:** CFPB letter replying to Jan. 27 joint trade association letter
- **Feb. 18:** CFPB releases final draft of Settlement Disclosure
- **Feb. 21:** CFPB releases outline of proposals under consideration
- **Feb. 21:** CFPB announces formation of a Small Business Review Panel on "Know Before You Owe" mortgage disclosures
- **Feb. 23:** ALTA white paper offers input to improve RESPA's average charge to benefit consumers and industry while achieving regulatory goals
- **Feb. 23:** ALTA letter to CFPB staff regarding technology implementation of combined mortgage disclosure forms; Software providers believe it would and take 12 to 14 months of development time and cost between $1.5 to $2 million per software provider to redesign software systems to implement new regulation
- **March 6:** CFPB holds Small Business Regulatory Enforcement Fairness Act panel
- **March 13:** ALTA SBREFA panelist letter to CFPB Director Richard Cordray; letter says title industry estimates using draft forms in accordance with the regulatory outline will increase costs to small business settlement providers by as much as $800 per employee in upfront implementation and training costs, and a 20 percent increase in yearly software maintenance fees
- **March 20:** ALTA participates in a CFPB-hosted joint trade association TILA/RESPA roundtable
- **April 12:** ALTA letter to CFPB staff regarding accuracy of GFEs
- **April 12:** ALTA letter to CFPB on third round of Settlement Disclosure to Replace HUD-1; ALTA suggests the bureau design the disclosures so that the portion containing mostly loan information would be completed by the lender. The portion of the disclosures that contain mostly transactional and financial information would be completed by the settlement agent
- **April 16:** Joint trade association letter to CFPB commenting on the Feb. 21 overview of proposals under consideration
- **April 16:** Joint trade association letter to CFPB urging the consumer bureau to "get it as right as they can"
- **June 7:** CFPB staff holds roundtable in D.C. with more than 30 ALTA members to discuss issues with forms
- **June 21:** ALTA President Chris Abbinante testifies before Congressional Subcommittee
- **July 21:** Statutory deadline for CFPB to propose integrated RESPA/TILA regulations and forms
- **Fourth Quarter:** Public comment period closes

2013 *

- **First and Second Quarter:** CFPB reviews public comments
- **Second and Third Quarter:** CFPB expected to issue final RESPA/TILA regulation and forms

2014 *

- Projected year when industry must begin using new mortgage disclosure forms

* Estimated

To read about ALTA's advocacy efforts in more detail, go to *www.alta.org/CFPB*.

HARP Refinances Surge in First Quarter, FHFA Reports

Title Companies May Find Additional Business as Refis Expected to Spike an Additional $200 Billion in 2012

The quarterly number of loans refinanced through the Home Affordable Refinance Program (HARP) has nearly doubled since HARP 2.0 was rolled out in January, according to the Federal Housing Finance Agency's (FHFA) March 2012 Refinance Report.

HARP refinances topped 180,000 in the first quarter of this year compared to approximately 93,000 in the fourth quarter of 2011. The increased HARP volume is attributed to enhancements to the program announced last fall. The enhancements include the removal of the loan-to-value (LTV) ceiling for borrowers who refinance into fixed-rate loans and the elimination—or lowering—of fees for certain borrowers. Only loans that are owned or guaranteed by Fannie Mae and Freddie Mac are eligible to participate in HARP.

According to the report:

- One in seven refinanced loans during the quarter was through HARP.
- The number of loans refinanced through HARP in the first quarter of 2012 nearly doubled compared to the number of loans refinanced through HARP in the fourth quarter of 2011, driven by a sharp increase in the number of loans refinanced above 105 percent LTV.
- In March alone, there were nearly 80,000 HARP refinances, a quarter of them on loans with LTVs greater than 105 percent.
- More than 4,400 loans with LTVs greater than 125 percent were refinanced since the beginning of the year; over half these loans were refinanced in the states of California, Florida and Arizona.

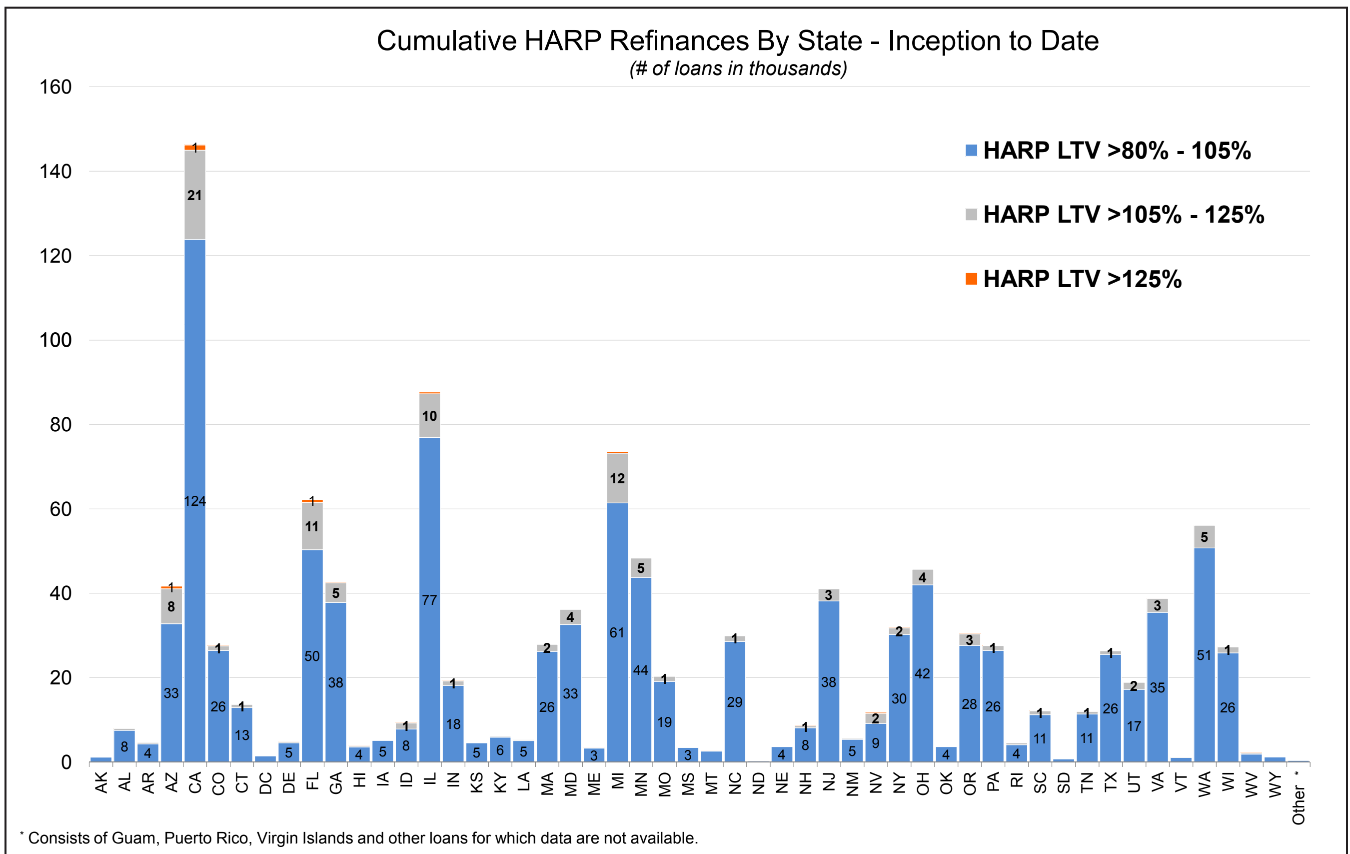
The HARP 2.0 initiative has resulted in the Mortgage Bankers Association (MBA) increasing its mortgage origination forecast for 2012 by almost $200 billion, due entirely to an increase in refinances. The MBA now expects that mortgage originations will reach $1.28 trillion in 2012, up from $1.26 trillion in 2011.

Refinance originations are now expected to total $870 billion in 2012, an almost identical amount to 2011. The MBA is slightly lowering its purchase originations forecast for 2012 from $415 billion to $409 billion.

"We factored HARP lending of roughly $100 billion in both 2012 and 2013 into our April forecast, and the HARP share of refinance activity has remained relatively constant over recent months," said Mike Fratantoni, MBA's vice president of research. "However, mortgage rates below 4 percent and regular media coverage showcasing 'record low mortgage rates' provide sufficient incentive for borrowers to examine their current rate. Additionally we have revised our estimates for the first and second quarter of 2012."

Looking to capture some of this refinance business, Title Resource Group plans to significantly expand its workforce to meet the rising demand for its services brought on by new business volume added in the first quarter of 2012. The company intends to add approximately 400 employees, with the majority of those hires to be based at its headquarters in Mt. Laurel, N.J., and the remainder at its office in Houston, Texas.

"We have continued to expand our lender channel business in the first quarter of 2012, and the increased business volume from new and existing clients is driving significant job growth for us," said Don Casey,



Source: FHFA

president and CEO of Title Resource Group. "It feels good to be hiring in this economy. We expect to increase the overall size of our workforce by about 12 percent, to over 2,000 employees."

TRG's title agency and underwriter business completed over 93,000 purchase transactions and 62,000 refinancing transactions in 2011. The company grew its revenue by 10 percent and increased its earnings by 16 percent last year. TRG is looking to add a range of positions, including title examiners, closing communicators, and title and recording specialists.

Meanwhile, home values have started to eke upward in places. But, so far, this has done little to buoy millions of underwater homeowners who, according to a report released by Zillow in May, collectively owe $1.2 trillion more than their homes are worth.

According to the Zillow Negative Equity Report, nearly one in three homeowners with a mortgage—15.7 million people—were underwater on their mortgage in the first quarter of this year.

"Negative equity remains an issue for the housing market as a whole, and poses a risk to any recovery," said Zillow Chief Economist Stan Humphries. "Not only does negative equity tie many to their homes, by making homeowners unable to move when they may want to, but if economic growth slows and unemployment rises, more homeowners will be unable to make timely mortgage payments, increasing delinquency rates and eventually foreclosures."

Foreclosure is not imminent for most underwater homeowners, according to Zillow, as nine out of 10 homeowners continue to make mortgage and home loan payments on time, with only 10.1 percent more than 90 days delinquent.

Additionally, many homeowners in negative equity are not deeply underwater. Nearly 40 percent of underwater homeowners owe between 1 and 20 percent more than their home is worth.

Nevada has the highest percentage of negative equity, with 66.9 percent of all homeowners with mortgages underwater, followed by Arizona (52.3 percent), Georgia (46.8 percent), Florida (46.3 percent) and Michigan (41.7 percent).

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U.S. Supreme Court Affirms ALTA's Stance on Fee Splitting in Freeman v. Quicken Loans Ruling

Decision Clarifies Fees Settlement Service Providers and Others Can Charge Consumers

In a 9-0 ruling in *Freeman v. Quicken Loans Inc.*, the U.S. Supreme Court affirmed the American Land Title Association position that an unearned fee must be split between two or more parties to violate the Real Estate Settlement Procedures Act (RESPA). The ruling settles a dispute among the Courts of Appeals.

"The Supreme Court recognized that Congress never intended RESPA to be a remedy for all alleged pricing issues," said Michelle Korsmo, chief executive officer of ALTA. "RESPA was intended to ensure that consumers receive appropriate disclosures about their closings and to prohibit certain limited abusive practices—namely kickbacks and fee splitting where no services were performed."

Section 8(b) of RESPA states that no person shall give or accept "any portion, split, or percentage of" a charge for a real estate settlement service except for services actually performed. In this case, the plaintiffs were charged loan-discount fees but did not provide reduced interest rates in return.

While it is unfortunate that the plaintiffs believe they were harmed by this practice, Korsmo said there are various appropriate avenues to pursue when consumers believe they are overcharged for a product or service. These include state attorneys general, state insurance departments and federal agencies like the Federal Trade Commission and the new Consumer Financial Protection Bureau.

"Today's decision brings necessary clarity to RESPA and the charges that settlement service providers and other real estate companies can charge to consumers," Korsmo added.

Background

Three married couples received mortgage loans from Quicken Loans. The consumers filed three separate lawsuits against Quicken, alleging the company had charged fees for which no services were provided and therefore the fees violated RESPA.

One such charge was labeled a "loan processing fee," while another charge was a "loan discount fee," even though it was alleged Quicken had not provided a discount. The consumers did not allege that the lender had split any of these fees with a third party.

Quicken argued that because it had not split its fees with any third parties there was no RESPA violation. The consumers asserted that a 2001 policy statement issued by the United States Department of Housing and Urban Development (HUD) prohibited the collection of unearned fees for real estate settlement services. Because of this, it was asserted any of the lender's charges where no services were provided violated RESPA.

After the lawsuits were consolidated in federal court, the lower courts ruled in favor of the Quicken and the consumers appealed.

Ruling

The Supreme Court affirmed the rulings of the lower court, resolving a division among federal circuit

courts of appeal. Previously, some circuits had required a fee split with a third party in order for there to be a Section 8(b) violation, while others had followed the HUD policy statement and prohibited unearned fees, even when a settlement-service fee was not split with a third party.

The Supreme Court opinion by Justice Antonin Scalia rejected HUD's interpretation of RESPA, finding that the statutory language "unambiguously covers only a settlement-service provider's splitting of a fee with one or more other persons." That language, the court said, "cannot be understood to reach a single provider's retention of an unearned fee."

Further, the court stated that the language used by Congress in drafting Section 8(b) describes two separate exchanges, where one party receives a settlement fee and then pays a portion of the fee to a third party. Without such payment to a third party, the Supreme Court determined that there is no violation of RESPA.

The Supreme Court found the consumers' arguments unpersuasive. First, the Supreme Court declined to defer to HUD's RESPA policy statement because HUD's interpretation was inconsistent with the plain language of the statute.

The justices also rejected the argument that the consumers were the ones making the prohibited payments when they paid settlement service providers unearned fees, as Congress could not have intended to make consumers potentially criminally liable when it banned both the payment and acceptance of certain types of payments.

Finally, the Supreme Court also stated that Section 8(a) and 8(b) contain separate prohibitions, rejecting the consumers' argument that the two sections must be read in conjunction with each other to ban unearned fees. Section 8(a) broadly bans kickback arrangements in exchange for referrals of real estate settlement services, whereas Section 8(b) covers arrangements dividing specific settlement service payments between two parties. Thus, the Supreme Court affirmed the rulings of the lower courts.

> "Today's decision brings necessary clarity to RESPA and the charges that settlement service providers and other real estate companies can charge to consumers."

Impact

In January, ALTA filed an amicus brief which recounted the legislative history of RESPA. In the past, title companies have been the targets of these suits for situations in which there was an inadvertent overcharge for recording fees, charging reconveyance fees during a refinance and charging above the filed rate and splitting the fee with the title agent.

According to the law firm Ballard Spahr, the Freeman decision has greater importance than simply eliminating an over-reading of Section 8(b) of RESPA. At the Supreme Court's invitation, the Solicitor General, joined by the Consumer Financial Protection Bureau (CFPB), had filed an amicus brief that urged the Supreme Court to adopt the borrowers' interpretation of Section 8(b).

Ballard Spahr, the decision "stands strongly for the proposition that the CFPB's interpretation of statutes will be judged against the plain language of those statutes, and that the Court will not give deference to an interpretation not supported by that plain language. Moreover, the court's rejection of the arguments advanced by the Bureau in its amicus brief will hopefully encourage lower courts to look on other CFPB amicus briefs with a similarly critical eye."

The decision does not in any way alter RESPA's prohibition against the payment of anything of value in return for the referral of business.

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D. Bello Associates Founder to Retire

California-based D. Bello Associates announced that company founder Doug Bello will retire later this year after working in the title insurance industry for more than 40 years.

Bello, who founded D. Bello Associates in 1988, will serve in an advisory capacity as president and on the board of directors. Day-to-day operational responsibilities were given to Jeffrey Bates in March.

"I'm excited to continue to be a part of the company, but also excited that I will now have new doors opened in my life to allow me to do many of the things I've wanted to do but never had the time," Bello said.

Bello entered the industry fresh out of college in 1970, joining Chicago Title in Los Angeles as a printer. He was promoted to customer service, then searching and ultimately a production title officer. In 1980, Bello was named president of Title Records Inc., which was the largest title plant in the United States based on recording volume.

In 1989, Bello was elected by a federal judge to serve on a committee to refurbish Hawaii's recording system. Many of his recommendations remain in place today. In the early 1990s, he served as a consultant for the Russian Land Privatization Committee to discuss land reform and private ownership under the restructuring policy of Perestroika.

WFG National Title Launches TitleNet

WFG National Title Insurance Co. has launched TitleNet, a national network of independent settlement services providers that will service high volumes of settlement transactions.

Joe Drum, executive vice president of WFG National Title, said the network allows participants to order, receive and deliver title insurance and settlement services for residential, resale, refinance, commercial, loss mitigation, default and REO transactions.

Closing USA Acquires American Coast Title

Rochester, N.Y.-based Closing USA announced the acquisition of a controlling interest in American Coast Title (ACT), a title and escrow company with offices in Glendale and San Diego.

For Closing USA, a leading minority-certified title and escrow company, the deal means access to the enormous California market, which accounts for almost 25 percent of all real estate transactions, said Elliot Foo, Closing USA's president and CEO.

He said that the combination of ACT's local market expertise and Closing USA's national customer base is the best of both worlds. In addition to ACT's ongoing presence in Glendale and San Diego the company plans to expand by opening an office in Orange County.

"Our expansion into Orange County will solidify our commitment to the Southern California market," Foo said. "Orange County fills the coverage gap perfectly between Glendale and San Diego, providing support for our local market growth."

RamQuest's Closing Market Network Surpasses Five Million Transactions in April

RamQuest Inc., a provider of business solutions for the title insurance industry, reports its Closing Market digital network reached a new milestone of five million unique transactions during April 2012.

Closing Market is RamQuest's application-to-application interface that electronically connects business partners, allowing each participant to work from within their own software. In these same metrics, RamQuest reports 1.3 million orders have been accepted through the Closing Market network to date—these include title orders received by RamQuest title companies that were initiated by lenders and other Closing Market partners. Additionally, Closing Market is consistently delivering more than 100,000 documents each month.

Failed Bank List Grows to 24 in 2012

Six more banks were closed in May, bringing the total number of Federal Deposit Insurance Corporation-insured institutions to fail this year to 24.

- In Alabama, the Office of the Comptroller of the Currency closed Alabama Trust Bank, National Association. The bank was reopened as Southern States Bank in Alabama. This is the first FDIC-insured bank to fail this year in Alabama. The last was Superior Bank in April 2011.
- Security Bank, National Association in Florida was closed as Banesco USA assumed all of the deposits. This is the third FDIC-insured institution to close this year in Florida. The last was First Guaranty Bank and Trust Co. in January.
- In California, Palm Desert National Bank was closed. Pacific Premier Bank, Costa Mesa assumed all of the deposits. Palm Desert National Bank is the first FDIC-insured institution to fail this year in California. The last FDIC-insured institution closed in the state was Citizens Bank of Northern California on Sept. 23, 2011.
- In South Carolina Plantation Federal Bank was closed and First Federal Bank assumed all of the deposits of Plantation Federal Bank. The last FDIC-insured institution closed in the state was BankMeridian on July 29, 2011.
- In Minnesota, Inter Savings Bank, doing business as InterBank, was closed and Great Southern Bank assumed all of the deposits. This is the third FDIC-insured institution to fail this year in Minnesota. The last was Home Savings of America in February.
- In Maryland, HarVest Bank of Maryland was closed and Sonabank assumed all of the deposits. This is the second FDIC-insured institution to fail in Maryland this year. The last was Bank of the Eastern Shore in April.

There were 92 FDIC-insured banks that failed in 2011.

Timios Obtains California Firm

Timios Inc., a title and escrow company licensed to conduct business in 40 states and the District of Columbia, recently acquired privately held Glenn County Title Co. (GCTC).

The transaction is pending approval from the California Department of Insurance.

"I am excited to announce our entry into the California market with the acquisition of GCTC," said Trevor Stoffer, CEO of Timios. "GCTC has an excellent history of dedication to their customers. We look forward to leveraging our technology service model to expand and support their clients."

Located in Willows, Calif., GCTC has serviced businesses and residents in Glenn County, Calif., since 1891. Timios provides various products and services to banks, direct mortgage companies and mortgage servicing companies through advanced technology in a paperless operating system.

Georgia Law Defines 'Settlement Agent'

A new law that goes into effect July 1 in Georgia limits who can prepare closing documents and disburse escrow funds.

According to Senate Bill 365, which was signed by the state's governor on May 2, settlement agents are defined as a "lender or an active member of the State Bar of Georgia responsible for conducting the settlement and disbursement of the settlement proceeds."

The new law applies to money loans made by the lender and refinance loans made by the current or new lender on properties not containing more than four residential dwelling units.

Any party violating the law shall pay the party suffering the loss $1,000 or double the amount of interest payable on the loan for the first 60 days after the loan closing, whichever is greater.

Any individual, corporation, partnership or other entity conducting the settlement and disbursement of loan funds, when not the settlement agent, shall be guilty of a misdemeanor, according to the legislation.

Nebraska Governor Appoints ALTA Member to State's Abstracters Board of Examiners

Debbie Scott of Omaha National Title & Escrow Co. has been appointed by Nebraska's Governor to sit on the state's Abstracters Board of Examiners for a five-year term.

The board, which was created in 1965, consists of five members appointed by the governor to carry out the purposes of and enforce the Abstracters Act. Scott, who is an ALTA member, replaces Julie Rawlings Hoppe of Vintage Title & Escrow Co., and joins John Feller of United Title and Escrow Co., attorney Donald Kucera, attorney Andrew Carothers and Judith Kay Farmer of Nebraska Title Co. on the board.

"I'm honored to have received the gubernatorial appointment to the board and humbled by the level of confidence my peers have in my ability to perform the tasks required of me," Scott said. "The board provides a vital function in ensuring abstracters have the knowledge to protect homeowners and lenders by providing an accurate history of the title to real estate."

The board is charged with the responsibility of supervising, inspecting, examining and reviewing the practices of licensees required under the abstracters' licensing law and regulating the registration and certification of individual abstracters, as well as those companies engaged in the business of abstracting. Members of the board review applications for approval of seminars and continuing education programs and a decision is rendered on the number of credit hours approved for each program.

Home Prices Show Stabilization in April, According to Case-Shiller Indexes

Home prices showed fresh signs of stabilization in April, according to the S&P/Case-Shiller indexes.

The composite 20-city home price index, a key gauge of U.S. home prices, was up 1.3% in April from the previous month and fell just 1.9% from a year earlier. Although prices continue to fall on an annual basis, the rate has slowed indicating that home prices may be close to posting year-over-year gains. Ten of the 20 cities posted annual increases in April.

"While one month does not make a trend, particularly during seasonally strong buying months, the combination of rising positive monthly index levels and improving annual returns is a good sign," said David Blitzer, chairman of S&P's index committee.

Just one city—Detroit—posted a monthly decline in April. Partly because April marks the start of the strong spring selling season when prices traditionally move higher. But on a seasonally adjusted basis, which aims to correct for the variation, 17 of the 20 cities still posted monthly gains. The overall 20-city index was up 0.7% from the previous month by that metric.

S&P/Case-Shiller Home Price Indices

Metro Area	April 2012 Level	Monthly Change	Annual Change
Atlanta	84.5	2.3%	-17.0%
Boston	147.2	0.9%	0.1%
Charlotte	111.2	1.6%	0.8%
Chicago	103.9	1.1%	-5.6%
Cleveland	96.9	2.3%	-1.3%
Dallas	116.5	1.7%	2.8%
Denver	125.8	1.7%	2.8%
Detroit	65.3	-3.6%	1.2%
Las Vegas	90.8	1.1%	-5.8%
Los Angeles	162.2	1.5%	-3.6%
Miami	141.3	0.4%	3.2%
Minneapolis	109.8	0.5%	3.8%
New York	157.7	0.1%	-3.8%
Phoenix	109.0	2.5%	8.6%
Portland	131.6	2.0%	-0.9%
San Diego	151.8	1.4%	-1.8%
San Francisco	130.2	3.4%	-1.4%
Seattle	133.8	2.0%	-1.0%
Tampa	127.5	1.9%	0.8%
Washington	181.3	2.8%	1.6%

Source: *Case-Shiller and Fiserv*

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Matthew R. Kobelski
Credentials Title & Escrow, LLC
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Gina Wilson
Pusateri & Pusateri, P.C.
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Krysta Hendrix
Reliable Research Solutions
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Laura J. McKee
Spyglass Title LLC
Pepperell

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Gwynne Kesselman
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The Fuse Is Burning and Time Is of the Essence—The Pending Expiration of the Mortgage Forgiveness Debt Relief Act

The clock is ticking when it comes to debt forgiveness, both for individuals facing foreclosure and for those who are underwater and desire to complete a short sale on their primary dwelling. What may not be a taxable event in 2012, might become imputed ordinary income in 2013 (assuming Congress does not extend some previous legislation). If you have customers contemplating a short sale or being foreclosed on, make certain they have these completed by year's end or they will potentially owe ordinary income tax in 2013 on the same transaction. Time is quickly expiring.

When you owe a debt to someone and the obligation to repay that debt is either canceled or forgiven, you may owe standard income tax on that amount—i.e. the forgiven debt is considered imputed ordinary income by the IRS in most circumstances. One of several exceptions, at least from Jan. 1, 2007 through Dec. 31, 2012, is debt forgiven on primary dwellings—an exclusion created by the Mortgage Forgiveness Debt Relief Act (MFDRA). When a debt repayment is canceled, the lender in most circumstances is required to report that amount to the borrower and the IRS—with the borrower receiving a Form 1099-C (cancellation of debt).

In late 2007, Congress passed the MFDRA, which details the following circumstances under which no income tax liabilities may be due for debt relief on a borrower's primary dwelling:

- Debt must have been used to buy, build or improve a person's primary dwelling, or the debt could also be a refinance of the prior. If the debt was a cash-out refinance not used to improve or purchase the property, it would not qualify under the MFDRA.
- The debt must be forgiven between Jan. 1, 2007 and Dec. 31, 2012.
- Only primary dwellings qualify—not second homes, cars, credit cards or student debt.
- A married couple filing jointly can qualify for up to $2 million of debt forgiveness on their primary dwelling while a single person or a married person filing separately qualifies for up to $1 million at the time the loan was forgiven.
- Even though the debt is forgiven, the taxpayer must report that amount on IRS Form 982 (completing just lines 1e and 2).

Time is of the essence for struggling underwater homeowners. Always urge consumers to consult expert tax counsel for individual specifics and potential tax implications.

– Ted Jones, senior vice president and chief economist, Stewart Title Guaranty Co.

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