October 2015

TitleNews

Official Publication of the
American Land Title Association

Litigation and the Title Industry

Review of Top Lawsuits Help Identify Trends Impacting Coverage and Risk

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2016 ALTA CONFERENCES

March 16-18	Business Strategies Conference *Indianapolis, IN*
May 16-18	Federal Conference & Lobby Day *Washington, DC*
October 4–7	Annual Convention *Scottsdale, AZ*

STATE CONFERENCES

November 9 - 11	Florida *Delray Beach, FL*
December 4 - 6	Louisiana *New Orleans, LA*

Look at What You're Missing in this month's Digital Issue

Homebuyer Outreach Program Webinar

On page 8, the digital edition includes a recording of the September Title Topics webinar, which outlined ALTA's Homebuyer Outreach Program and all the resources members can use to educate consumers about the benefits of owner's title insurance.

Go to ***www.alta.org*** *to get your copy of Digital TitleNews Today!*

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United We Stand to Protect

The new TRID rules hadn't even become effective before we heard of the word "optional" influencing a homebuyer's decision to purchase an owner's title insurance policy. Prior to the Oct. 3 implementation, an ALTA member told us that a lender asked if their client really needed title insurance since it is "optional."

Fortunately, the title company was proactive in offering advice. The company encouraged the homeowner to go to ALTA's Home Closing 101 website (*homeclosing101.org*) to get information about how title insurance protects their investment. The company also provided two educational articles for the lender to share with the homebuyer.

The "optional" label of owner's title insurance on the integrated disclosures distorts the importance of the product, but the label and the questions that follow provide our industry the opportunity to explain how we protect property rights. It's our duty as professionals to provide this education.

Everyone in the industry—from sales people and attorneys to escrow and settlement agents—need to be able to answer this question: "Why do I need title insurance since it's optional?" We expect situations like this only to increase. That's one of the reasons why your trade association developed the Homebuyer Outreach Program and all the material available in the Homebuyer Guide (*alta.org/homebuyer*). We unveiled the program during our Annual Convention and held a webinar in September, but expect much more from ALTA promoting consumer outreach. This is something that must be done. ALTA is here to help.

Providing resources to help our members succeed is one of our core business purposes. Another example of providing key information can be found in this month's cover article, which summarizes some of the most significant court cases affecting the industry. These cases have been summarized by ALTA's Title Counsel, which is comprised of the brightest industry attorneys who pore over case law to share how court opinions could impact coverage and liability.

Getting back to TRID, within weeks many of you will start closing the first transactions with the Closing Disclosure. There will be bumps along the way as everyone learns how the new forms work in real-life transactions. ALTA will monitor the market and listen to members for key issues that need to be addressed by policy makers and items that need more industry education. I encourage everyone to share information and follow our blog (*blog.alta.org*). By working together to get TRID compliance right, we are united. United as an industry, we will provide exceptional service to consumers. United, we protect!

— Michelle Korsmo, ALTA chief executive officer

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ALTA Endorsement 46-06 Published in Final; Technical Corrections Announced

ALTA Endorsement 46-06 (Option), which was approved by ALTA's Board in June, has passed through the comment period and is now published in final.

A real estate option is a written agreement or contract giving the holder of the option the right, but not the obligation, to acquire an interest in real property for an agreed upon price and within a certain time frame.

There is a market need for an endorsement that provides basic coverage to the insured for loss resulting from certain risks associated with an option.

The endorsement can be used in situations where the insured named in a policy is also the holder of a specific option identified in the endorsement.

Additionally, technical corrections have been made to the ALTA Short Form Commitment and ALTA Endorsement 15.2-06. All forms are available at *www.alta.org/forms*.

If you have comments or concerns, forward them to Kelly Romeo, the staff liaison for the Forms Committee, at *kromeo@alta.org*.

Rep. Hill Pushes for Hold-harmless Bill for TRID

As *TitleNews* went to print, the U.S. House of Representatives was scheduled to vote on an ALTA supported bill that would provide limited liability for those who in good faith attempt to comply with the new TILA-RESPA Integrated Disclosure (TRID) requirements.

Sponsored by U.S. Reps. French Hill (R-Ark.) and Brad Sherman (D-Calif.), the Homebuyers Assistance Act (H.R. 3192) would provide a hold-harmless period until Feb. 1, 2016. The bill also says that no lawsuit may be filed against a person for a violation of the TRID rule occurring before such date, so long as the person has made a good faith effort to comply.

For the latest on TRID, go to *www.alta.org/cfpb*.

FHA Announces Anticipated Guidelines for FHA Financing on Homes with PACE Liens

The Federal Housing Administration (FHA) on Aug. 24 issued anticipated guidelines that will require Property Assessed Clean Energy (PACE) liens to be subordinate to FHA single-family first-mortgage financing.

PACE loans allow homeowners to build the costs for energy-efficiency upgrades, such as adding insulation and installing energy efficient windows or solar panels, into their property tax bills. PACE is available in 31 states.

There was industry concern that in the event of a default, the PACE loan as a tax assessment may have super-lien status and/or take precedence over the first-lien mortgage. The FHA said it is developing single-family PACE guidance to overcome impediments in the purchase and sale of properties to which PACE loans are attached due to these concerns.

The FHA's guidelines would sync with the Federal Housing Finance Agency's (FHFA) policy that prohibits Fannie Mae and Freddie Mac from buying mortgages or notes with PACE-type "super liens."

RAMQUEST CUSTOMERS SEE A BRIGHT HORIZON WITH THEIR CLOSING DISCLOSURE

"Knowing our future is filled with change, we need to partner with a proven leader. From the beginning, RamQuest has been that leader, understanding & creating solutions to meet the demands of the TRID Rule. They learned it, resolved the issues & produced a product so early that we had time to test, train & prove our value to our clients before others even knew what TRID meant. RamQuest takes the worry out of the future because they are our partner in the truest sense of the word."

- Anne Anastasi, RamQuest Customer & President, Genesis Abstract, LLC

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TitleNews Digital Edition Extra: Homebuyer Outreach Program Webinar

Social Media Pro-Tip: Engage with Consumers Today

Homebuyers demand more information and education than ever before. Regulators and lawmakers continue to question the benefits our industry provides. At the same time, owner's title insurance is now labeled as "optional" on the new TRID forms.

It's more important than ever to reach out to homebuyers earlier in the real estate transaction. ALTA's new Homebuyer Guide has resources for companies of any size to successfully communicate with and educate homebuyers. Included in the guide are sample social media posts for Facebook and Twitter that can fill up your content calendar for several weeks.

Check out the Homebuyer Guide at *www.alta.org/homebuyer*. If you have questions or need any help, email us at *social@alta.org* .

#12DaysofTitle is Coming

Our most popular social media promotion, #12DaysofTitle, is just months away! What are you most proud of in the industry? What benefit of owner's title insurance do you think consumers care about the most? Why are you excited to work in this industry? Email us your thoughts to *social@alta.org* using #12DaysofTitle. Some of your responses may be included on ALTA's Facebook and Twitter accounts!

National Breast Cancer Awareness Month

We are excited to once again offer our pink "Keep Calm and Love Title" t-shirts this month! These shirts commemorate National Breast Cancer Awareness Month and incorporate the pink breast cancer awareness ribbon in our design. The shirts are $20 each. A portion of the proceeds will be donated to Susan G. Komen. Shirts can be purchased at *www.alta.org* in the ALTA Store.

ALTA's Homebuyer Outreach Program

Did you miss our September webinar on ALTA's new Homebuyer Outreach Program? Check out our Title Topics archives to hear from Tim Evans NTP (Evans Title Agency), Nancy Hughes (Jackson Hole Escrow & Title Company) and Wayne Stanley (ALTA) on the new resources available for ALTA members. The webinar recording is available at *www.alta.org/titletopics*.

As the industry continues to change, First American is evolving too. We've retooled our technologies, streamlined our processes and trained our people to help our agents adapt – and thrive – on a whole new playing field.

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Litigation and the Title Industry

Review of Top Lawsuits Helps Identify Trends Impacting Coverage and Risk

Defending against litigation and class-action lawsuits can result in a hefty price tag. That's one of the reasons why ALTA has pushed Congress to pass legislation that would provide a hold-harmless period for companies making good-faith efforts to comply with the TILA-RESPA implementation. Legislation pending in the U.S. House of Representatives also says that no lawsuit may be filed against a person for a violation of the TRID rule occurring before such date, so long as the person has made an effort to obey the rule. >>

In this environment, it's important to protect yourself against litigation, and observe and understand trends. According to North Rose Fulbright's 2015 Litigation Trends Annual Survey, the legal environment is expected to grow in complexity. Of the more than 800 corporate counsel that participated in the survey, 25 percent anticipate litigation against their companies increasing in the next year. Half of all respondents have spent more time during the last three years addressing regulatory requests or enforcement proceedings. Class action lawsuits were listed as the top litigation issue by respondents.

"What we are seeing is a direct response to the ever-broadening array of legal and regulatory challenges that companies face today," said Gerry Pecht, global head of Dispute Resolution and Litigation for Norton Rose Fulbright. "As the business environment becomes more complex, companies are spending more out of necessity to protect their interests and ensure that they are represented properly."

As a service to ALTA members, ALTA's Title Counsel has reviewed nearly 100 cases relevant to the land title insurance industry to identify potential threats or trends in the interpretation of a law or regulation affecting the title insurance industry.

"Knowing about and understanding these key decisions can prove helpful in protecting a company against any unexpected liabilities," said Marjorie Bardwell, chair of ALTA's Title Counsel Committee and Director—Underwriting Services for Fidelity National Title Group. "ALTA's Title Counsel Committee is dedicated to sharing information with membership about developments in the law affecting the industry. "Through ALTA, title professionals have access to the kind of information that a compliance officer or general counsel would consider important in identifying trends."

In no particular order, the following are summaries of the facts from the top 10 lawsuits, the courts' decisions and an explanation of why the case is important to the land title insurance industry. From federal and state courts around the country, the cases address various issues such as vicarious liability, the Real Estate Settlement Procedures Act, rights to abandoned railroad lines, mechanics' liens, bona fide purchasers and more.

> "Knowing about and understanding these key decisions can prove helpful in protecting a company against any unexpected liabilities."

In addition to Bardwell, other Title Counsel members providing case summaries are Jennifer Briner of Briner Law Group, Shawn T. Briner of Briner Law Group, Justin Lischak Earley of First American Title Insurance Co., Avi Marcus of Old Republic Title, sole practitioner Lance Pomerantz and Debra Smith of Madison Commercial Real Estate Services.

BB Syndication Services, Inc. v. First American Title Insurance Co.

780 F.3d 825 (7th Cir. 2015).

FACTS: Construction of a large commercial development was aborted due to cost overruns. When the developer would not cover the shortfall, the construction lender stopped releasing committed loan funds, and contractors filed liens against the property for work done prior to the most recent policy date-down. The developer went into bankruptcy, and the contractors' liens were given priority over the lender's security interest. The lender looked to its title insurer for indemnification.

The insurer invoked Policy Exclusion 3(a), which excludes coverage for liens that are "created, suffered, assumed or agreed to" by the lender. The issue was whether the lender "created" or "suffered" the mechanics' liens by cutting off loan funds pursuant to its "loan-balancing" rights in the financing documents.

HOLDING: Following denial of coverage, the lender sued alleging breach of the title policy and bad-faith denial of coverage. First American removed the case to federal court, where the district court held in a split ruling that First American breached its duty to defend and thus was required to reimburse the lender for its attorneys' fees in the bankruptcy litigation. However, the court also ruled that First American did not have an obligation to indemnify

the lender for the mechanics' liens because coverage was excluded under Exclusion 3(a). The lender appealed the latter ruling to the Seventh Circuit Court of Appeals. The court concluded that BB Syndication had responsibility to discover and prevent the cost overruns on the project and viewed its willingness to continue making advances in the face of known cost overruns as a risky business decision. When liens arose from insufficient funds, the insured lender had "created" them by failing to discover and prevent cost overruns. Controlling case law holds that Exclusion 3(a) bars recovery only when an insured lender engages in intentional misconduct, breach of duty, or otherwise inequitable dealings. Because the lender had control over *when* the project was aborted, it was deemed at fault for any resulting mechanics' liens. While the contractual "loan-balancing" provisions permit a funding cut-off, they do not address whether the lender owed a duty *to its title insurer* to discontinue funding before imperiling the enforceability of its security interest.

RELEVANCE TO THE TITLE INDUSTRY: The court enunciated the sound policy reasons for placing the risk of loss on the insured in this scenario. First, construction lenders have significant ability to ensure that the projects they finance remain economically viable. Throughout the construction process, they can use the threat of default to force the developer to supply additional funds. Only a lender has the ability—and thus duty—to investigate and monitor the construction project's economic viability. This interpretation also has the advantage of being a clear rule that all the parties to the deal can bargain around.

Second, other insurance products and financial instruments, such as performance bonds and third-party guarantees, can be used to protect against the risk of liens arising from insufficient funds. This opinion provides title insurance companies with legal support and multiple arguments for denying any duty to indemnify insured lenders for mechanics' liens filed against construction projects that fail due to financing problems. The court pointed out that a lender could bargain with its title insurer for an endorsement expanding the standard policy coverage, such as the so-called "Seattle Endorsement." [*Caveat:* the "Seattle" (or "Seafirst") Endorsement or similar *ad hoc* expanded coverage enjoys only limited availability and is not ALTA approved.]

Lance Pomerantz is a New York sole practitioner who provides litigation consultation, strategy and expert testimony in land title disputes. He can be reached at *lance@landtitlelaw.com*.

First American Title Insurance Co. v. Lane Powell PC

764 F.3d 114, 2014 WL 4177379 (1st Cir. 2014).

FACTS: Lane Powell had a client named Charles Crovo, who owed significant attorneys' fees to the law firm. To address the unpaid fees, Crovo agreed to grant Lane Powell two mortgages on properties that he owned. Lane Powell understood that its mortgages would be inferior to existing mortgages that already encumbered Crovo's properties. Lane Powell requested loan policies on its mortgages from an agent of First American. Although Lane Powell confirmed to the agent that the pre-existing mortgages would not be paid off, the policies issued by the agent erroneously omitted the pre-existing mortgages as exceptions. When Crovo defaulted on his debts to the pre-existing lenders and to Lane Powell, the pre-existing lenders foreclosed, and the foreclosure proceeds were not sufficient to pay Lane Powell anything on its junior mortgages. Lane Powell sought coverage from First American, citing the fact that its policies did not contain exceptions for the pre-existing mortgages. First American denied the claim and filed a declaratory action against Lane Powell, contending that exclusion 3(a) barred Lane Powell's claims because Lane Powell had "assumed" and "agreed to" its junior creditor position.

HOLDING: The district court agreed with First American, granting it summary judgment. The First Circuit affirmed. The court recited the evidence showing that Lane Powell was fully apprised of the fact that it would be a junior mortgagee, reasoned that a holding in Lane Powell's favor "would result in an unwarranted and entirely unintended windfall for the insured," and concluded, "[e]quity will simply not have it." Notably, the First Circuit squarely rejected Lane Powell's argument that exclusion 3(a) only applies when there has been intentional misconduct or inequitable behavior by the insured, calling that argument a "rather nearsighted" reading of the case law.

RELEVANCE TO THE TITLE INDUSTRY: Exclusion 3(a) is one of the most litigated provisions of the title insurance policy. The First Circuit's decision stands as a strong

reminder of the common-sense basis of that exclusion. The case is also notable in that former U.S. Supreme Court Justice David Souter sat on the panel that rendered the decision.

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Anastasi v. Fidelity National Title Insurance Co.

134 Hawai'i 400 (2014)

FACTS: Fidelity National Title Insurance Co. defended Lloyd Anastasi in a lawsuit filed by Paul Stickney and Gregory Rand. The lawsuit alleged that Anastasi's mortgage was invalid because Anastasi's borrower, Alajos Nagy, obtained his title via forgery. Stickney and Rand won the lawsuit, Nagy's title and Anastasi's mortgage were invalidated, and Fidelity paid Anastasi the full amount of his insurance, $2,400,000. In a separate case, Anastasi sought additional damages and alleged that Fidelity unreasonably delayed his payment by continuing to defend him after concluding that Nagy's vesting deed was forged. The trial court granted summary judgment in favor of Fidelity based upon its contractual right to pursue Anastasi's defense to "final determination" and the contractual limitation forestalling Fidelity's liability for loss or damage until there is a "final determination." Anastasi's summary judgment record did not include 10 documents authored or received by the in-house attorney Fidelity assigned to Anastasi's claim because the trial court ruled they were privileged. Anastasi appealed.

HOLDING: The appellate court held that Fidelity cannot "overly rely" on the policy's final determination provisions to answer Anastasi's claim that his payment was unreasonably delayed in bad faith and that summary judgment was improper because "Anastasi argued and adduced sufficient evidence to contest whether Fidelity engaged in action that would 'demonstrate a greater concern for the insurer's monetary interest than for the insured's financial risk.'" (internal citation omitted). The

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appellate court also reversed the trial court's finding that certain documents were privileged based upon the dual functions served by Fidelity's in-house attorney, who "played a central role in the overall handling of Anastasi's claim, while also conducting legal analysis and providing her recommendations [to Fidelity] on the matter." In light of these dual responsibilities, the appellate court concluded that Fidelity did not meet its burden of establishing (1) that its in-house attorney's communications were primarily or predominately of a legal character, as opposed to standard claims handling; and (2) that its in-house attorney's writings were created because of anticipated litigation, i.e. would not have been created in substantially similar form without the prospect of litigation. The appellate court instructed the trial court to reevaluate the subject documents, leaving open the possibility that they would eventually have to be produced and could be considered in aid of Anastasi's bad faith claim on remand.

RELEVANCE TO THE TITLE INDUSTRY: This ruling demonstrates the lengths to which some jurists will go to avoid applying and enforcing the ALTA policy's "final determination" provisions. Here, the appellate court "resolved" the irreconcilability of Anastasi's claim that Fidelity should have paid his claim sooner with the policy's "final determination" provisions by concluding that Fidelity was "overly relying" on the express, written terms of the parties' insurance contract. The appellate court reached this decision even though the attorney it hired to represent Anastasi told Fidelity that she thought Anastasi would prevail against Stickney and Rand and even though there was a question as to whether Anastasi himself may have been complicit in any forgery. Title insurers must know and prepare for the fact that providing defenses for their insureds may not insulate them from claims of bad faith in some jurisdictions or situations. Title insurers should also take care in assigning claims-related responsibilities to in-house attorneys. If the same attorney is tasked with administering the claim and advising the company, his/her internal communications and work product should be carefully drafted and annotated in order to facilitate the resolution of any privilege disputes that may arise.

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Brandt Trust v. United States

2014 U.S. Lexis 1788 (No. 12-1173)

FACTS: This case concerns title to an abandoned railroad right-of-way located in Wyoming. The United States maintained that it retained an implied reversionary interest in the land over which it had initially granted the right-of-way to the railroad under the General Railroad Right-of-way Act of 1875. It subsequently patented the land to the current owner's predecessors subject to the rail road's interests. The current owner insisted that the government had only conveyed an easement to the railroad under the original grant which terminated when the line was abandoned and that title therefore to the land under the right-of-way was vested free of the burden of the easement and any interest in the US. The U.S. sued the owner to quiet title in the government.

HOLDING: The land owner lost at the local and appeals level, but won at the U.S. Supreme Court. The court held that the government's arguments in a previous case, 70 years earlier were controlling. In that case the government argued that the grant under the same congressional act was only an easement and therefore the railroad retained no interest in the right of way.

RELEVANCE TO THE TITLE INDUSTRY: There has been some diversity of opinion in the lower courts, especially after the Rails-to-Trails program was initiated by Congress, as to the ownership of abandoned rail lines. Historically the courts, and therefore the title industry, analyzed the type of interest that was conveyed to the railroad—fee or easement—to determine the current status of ownership. The split in certain judicial circuits over that issue has been clarified to some extent. ALTA joined in an amicus brief in this case.

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Chase Plaza Condominium Association, Inc. v. JP Morgan Chase Bank NA; SFR Investments Pool 1, LLC v. US Bank, NA

98 A.3d 166 (D.C. 2014); 334 P.3d 408 (Nev. 2014).

FACTS: In each of these very similar cases, a buyer purchased property in a common-interest community through a purchase-

money loan from an institutional lender. The loan was secured by a traditional first mortgage on the property. The law for each of the respective jurisdictions (the District of Columbia and Nevada) provided that a homeowners' association in a common-interest community has a "super-priority" lien for a certain number of months' worth of homeowners' assessments (six months in the District of Columbia and nine months in Nevada, respectively). The buyer-borrower in each case later defaulted on both the mortgage loan and the obligation to pay assessments to the homeowners' association. The homeowners' association then recorded a lien on the property for the unpaid assessments, and proceeded to foreclose upon its lien. The buyers at the assessment lien foreclosures were investors who purchased the subject properties for amounts which, in each case, were mere fractions of the properties' market value. The investors then each took the position that the assessment lien foreclosure wiped out the mortgage held by the institutional lender, and litigation erupted between the investor and the lender in each case.

HOLDING: The District of Columbia Court of Appeals and the Nevada Supreme Court each came to the same conclusion: The foreclosure of the "super-priority" assessment lien divested all junior encumbrances, including the mortgage held by the institutional lender who made the purchase-money loan. The courts looked to the state statutes in question, which were each modeled upon the Uniform Common Interest Ownership Act. Both courts concluded that under ordinary principles of foreclosure law, where a senior encumbrance goes to foreclosure, the junior encumbrance is divested from the title, and is only entitled to any excess foreclosure proceeds over and above those needed to pay off the senior encumbrance. The courts saw no reason to treat this situation differently, and rejected the banks' arguments that the assessment lien statutes create only a "payment priority" under which the association merely gets paid its share of super-priority dues first out of the proceeds of the mortgage lender's foreclosure. However, each court noted that other challenges (such as unconscionability due to the low sale price versus the value of the property or lack of adequate notice for due process purposes) would need to be addressed by the lower courts.

> The interpretations of state statutes, like the holding in Chase Plaza Condominium Association v. JP Morgan Chase, present real challenges for the traditional understanding of a "first mortgage" on condominium, townhome or other common-interest community properties.

RELEVANCE TO THE TITLE INDUSTRY: These interpretations of state statutes present real challenges for the traditional understanding of a "first mortgage" on condominium, townhome or other common-interest community properties. Until the questions raised by these decisions are resolved, lenders may decide to escrow assessments, or even curtail lending, on properties that could be subject to these "super-priority" liens. Further legislative and judicial activity is likely as the marketplace grapples with the implications of these decisions.

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Spalding v. Stewart Title Guaranty Co.

463 S.W.3d 770 (Mo. banc 2015)

FACTS: In 2003, Randy Spalding purchased 419 acres of land with plans to develop and expand an existing lake to create a residential lake community. He also purchased a $1.7 million owner's policy. Three years later and before the lake expansion occurred, Paul Estes

claimed ownership to a one-acre tract, which would be located at the bottom of the expanded lake under Spalding's plan. Both Estes and Spalding had deeds to the one-acre tract and both were insured by Stewart Title. After an investigation, Stewart Title determined that Estes owned the one-acre tract. Based on that determination, in July 2006, Spalding made a claim to Stewart Title under the owner's policy. Stewart Title elected under paragraph 6 of the policy to pay the loss suffered as a result of the defect, which is measured as the difference in the value of the estate as insured and the value of the estate subject to the defect, lien or encumbrance. Based only on an appraisal, Stewart Title measured this diminution in value at $10,000 and sent a letter to Spalding with a check for $10,000 in July 2007. Spalding rejected the $10,000 check and in June 2011 filed suit against Stewart Title. At the conclusion of that suit, a verdict was entered against Stewart Title for $1.1 million under the policy, $110,150 in penalties and $81,000 in attorney's fees.

HOLDING: The two essential holdings in this case relate to the statute of limitations and measure of damages. First, the court held that the mere presence of a title defect does not establish a breach of the title insurance policy and does not start the running of the statute of limitations. Rather, for purposes of the statute of limitations, the insured's cause of action accrued when the breach of the policy occurred. Based on the facts of this case, the court held that the breach occurred in July 2007 when Stewart Title made the $10,000 offer that failed to adequately compensate Spalding for the actual monetary loss required by the policy. Second, the court upheld a damage instruction that allowed the jury to consider the highest and best use of the property, the value of the property on the open market, and appraisals in determining the fair market value of the property. Over Stewart Title's objections that the policy limits damages to "actual monetary loss or damage," the court found the following damages instruction to be an accurate statement of the law: "In determining the fair market value of the property, you may consider evidence of the value of the property including the highest and best use to which the property reasonably may be applied or adapted, the value of the property if freely sold on the open market and generally accepted appraisal practices." While Stewart Title argued that the policy prohibits consideration of the highest and best use of the insured property, the court found the policy was silent on that issue and on how the diminution valuation should be performed. The court rejected Stewart Title's contention that the "as insured" language in the policy required the jury to consider the property as undeveloped property as opposed to a fully developed lake community.

RELEVANCE TO THE TITLE INDUSTRY: This case provides insight into how future courts may construe the insuring and damages provisions of the title policy when a claim concerns property for which development is planned or contemplated. In those situations, courts may consider a variety of factors – including a property's the highest and best use—in determining diminution of value. As such, insurers would be wise to consider such information when evaluating their exposure because an insured may well be able to present that evidence to a jury. Further, it is important to note that the failure to consider all of these factors (and offering only the smallest valuation) was considered a breach of the policy and opens the insurer up to damages for vexatious refusal damages and attorney's fees. Finally, this case also illustrates the importance of the policy language or lack thereof. Where the policy is silent, the courts will fill in that gap based on their own interpretation, which may not be consistent with the way the title industry typically reads the policy.

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FDIC v. United General Title Insurance Co.

No. 11-CV-4610, 2014 WL 3611835 (E.D.N.Y. July 3, 2014).

FACTS: This case addresses the issue of apparent authority in the context of the underwriter-agent relationship. FDIC, as receiver for WAMU, commenced an action against United General Title Insurance Co. (UGT), Clear View Abstract LLC and others to recover losses sustained by WAMU. FDIC alleged that a mortgage fraud scheme was perpetrated by the agent. WAMU purchased three mortgages on the secondary market. The alleged scheme involved preparation of fraudulent documentation by Clear View, including tile insurance policies and commitments. It was alleged that the borrowers never purchased the properties and the mortgages that were purchased by WAMU were all shams. FDIC did

not allege that UGT had knowledge of the scheme. However, it sought to hold UGT liable on a theory of apparent authority. UGT moved to dismiss, arguing there was no basis under which it could have liability for its agent's actions.

HOLDING: The court reviewed the documentation in the mortgage files at issue. Two files contained unsigned title commitments, but the remaining file contained a fully executed title policy purportedly issued by UGT. The court reviewed the standards for establishing apparent authority; namely, that "(1) the principal was responsible for the appearance of the authority in the agent to conduct the transaction in question, and (2) the third party reasonably relied on the representations of the agent." *F.D.I.C., supra, at *3 (citing Herbert Const. Co. v. Cont'l Ins. Co., 931 F.2d 989, 993–94 (2d Cir.1991)).* The court granted UGT's motion for summary judgment as to the properties with respect to which the files contained only commitments. The court denied UGT's motion for the property in which the related mortgage file contained a title policy. With respect to the first prong of the holding, the reasoning of the court was that there could have been no justifiable reliance on the commitments as evidence of the apparent authority of agent. The commitments had blanks for a countersignature, date, and name and signature of authorized agent, none of which were completed. That was insufficient to establish apparent agency or serve as evidence of title insurance. However, the file for the third property contained what appeared to be a final title policy issued by UGT. That was, in the court's opinion, sufficient, to support a claim of apparent authority. The court made it clear that apparent authority could be established without direct communication between the principal and the party asserting the claim.

RELEVANCE TO THE TITLE INDUSTRY: This holding, albeit, only in the context of a summary judgment motion, could potentially expand the liability of underwriters for agent's acts in New York.

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Kloster v. Roberts, et. al.

No. 30546-5-III, 2014 WL 470742 (Wn. App. February 6, 2014)

FACTS: The appellants bought a vacant lot in rural Washington. They thought they held an access easement over adjacent property. However, the easement was never signed by the grantor, and a lawsuit arose regarding the validity and enforceability of the easement. The trial court ruled in favor of the Respondents, except the title company (First American), which was ordered to pay the cost to cure the lack of easement and some attorneys' fees. Appellants appealed, generally, as did the title company.

HOLDING: The court affirmed the trial court's rulings in favor of the respondents, and reversed the judgment against the title company on the ground that its policy did not cover the loss. The court declared that a title insurer's agent is not an "insurer" under Washington law, and therefore cannot be liable as an insurer under Washington law for breach of contract, breach of the duty to defend, or the breach of the duty to indemnify. The court further held that a title insurer owed no duty to defend an insured in the absence of a lawsuit.

RELEVANCE TO THE TITLE INDUSTRY: This case is significant in Washington since it further defines the relationship (from the perspective of liability) between a title insurer and its agent. The court also noted that the title insurer's duty to defend the insured is based on the language of the insurance contract, and the court would not step in to rewrite the insurance contract where no such duty is required.

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Concord Air, Inc. v. Malarz

2015 IL App (2d) 140639, (Ill. App. 2nd Dist., June 30, 2015).

FACTS: A senior lender judicially foreclosed its mortgage. A junior lender was a corporation, named in the foreclosure action but dissolved before the action commenced. By statute, service on a dissolved corporation was required to be made on the agent registered with the secretary of state. The senior lender's process server had attempted service on the junior lender at a private residence and failed. The senior lender then moved for permission from the trial court for service by publication. Although the affidavit in support of the motion was completely true, it did not explicitly recite that the failed service was attempted on the wrong person. The court granted the motion.

The property was sold at auction following foreclosure. The auction buyer sold to a third party who obtained a title report showing

that junior lender's interest had been extinguished. The third party then resold to a fourth party, the defendant Malarz. The junior lender then commenced a foreclosure action against Malarz. Claiming the trial court lacked personal jurisdiction due to defective service, the junior lender asserted that the foreclosure decree did not extinguish its lien.

Underwriting best practices typically calls for scrutiny of affidavits of personal or substitute service. The holding in Concord Air v. Malarz requires that every downstream insurer make a complex legal determination, even if the trial court fails to do so.

HOLDING: The foreclosure did not cut off the junior lender's mortgage and the subsequent purchasers were not bona fide purchasers. The affidavit submitted with the motion for publication was held to put the downstream purchasers on inquiry notice that the senior lender had not undertaken a diligent inquiry. Due diligence (on the part of the later buyers) required further inquiry into what the court characterized as "patently apparent discrepancies."

RELEVANCE TO THE TITLE INDUSTRY: Underwriting best practice typically calls for scrutiny of affidavits of personal or substitute service. Service by publication, which must be authorized by court order, is commonly given greater deference. This case requires that every downstream insurer make a complex legal determination, even if the trial court fails to do so. Contrary to the court's characterization, the discrepancy was "latent," not "patent," because its existence could not be determined without reference to the corporate dissolution and registered agent statutes. Underwriting staff, particularly non-attorney underwriters, will need to be trained to identify and analyze these situations.

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Weitz Co. LLC v. Heath

2014 Ariz. LEXIS 148

FACTS: This case concerns the relationship of mechanics' liens to equitable subrogation. The senior lender on a large condominium project in Arizona had priority over mechanics' liens through recording and released units as they were sold from its $62 million loans. Before sale of some of the last remaining units, the general contractor (Weitz) filed a lien for $4 million, and commenced this foreclosure action, joining the owners of the last 85 units that were sold. The owners (and their lenders) argued that they enjoyed the same priority as the loan they had paid off, albeit it only in an apportioned amount per unit, under the theory of equitable subrogation, which is recognized by statute in Arizona. The contractor argued that they were subordinate to his lien, once filed, and alternatively the equitable subrogation theory only applied when the earlier lien had been paid in full.

HOLDING: The court of appeals found for the contractor. The Supreme Court in Arizona determined that when a single mortgage was recorded covering multiple parcels the party paying a pro-rata share of the lien and obtaining a full release of a parcel may argue that equitable subrogation applies.

RELEVANCE TO THE TITLE INDUSTRY: The tension between the contractor, lender and purchaser is always present, especially in large projects. The claims that arise from these situations are often not foreseeable at the beginning of construction. The extension of the statute in Arizona to recognize the out sale protection of new buyers and lenders from mechanics liens is a welcome relief to the title industry.

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Ninth Circuit Rules Against Underwriter in RESPA Litigation

The U.S. Court of Appeals for the Ninth Circuit on Aug. 24 held that a title underwriter's equity investments in title agencies in exchange for agreements that the agencies would refer customers to the insurer violated anti-kickback provisions of the Real Estate Settlement Procedures Act (RESPA).

In *Edwards v. First American Financial. Corp*, borrowers filed a putative class-action lawsuit against the underwriter claiming violations of Section 8 of RESPA, which prohibits payments for the referral of settlement service business. In prior phases of the litigation, courts declined to certify the class, and the U.S. Supreme Court eventually granted *certiorari* but declined to rule on the merits of the litigation.

In this appeal, the plaintiff-borrowers asked the Ninth Circuit to review the district court's most recent denial of class certification. The law firm BuckleySandler reported that the Ninth Circuit affirmed the denial of the certification, finding that common issues did not predominate over individual issues for the proposed class. The court further stated that, while RESPA exempts payments for goods, facilities and services from Section 8's prohibition on referral fees, the title insurer's equity investments in the title agencies were not payments for goods, facilities or services. Further, the court found that RESPA's exemption from Section 8 available to affiliated business arrangements did not apply because no compensable services were performed by the title agencies in exchange for the payments and the title insurer did not receive any payments from the title agencies as a return on its ownership interests.

The CFPB had filed an amicus brief in the appeal as well. The law firm Ballard Spahr reported the bureau argued that when a referral agreement is entered into as part of a transaction involving the sale of ownership interests, a plaintiff can prove that the defendant paid for the referral without necessarily showing that the defendant overpaid for those ownership interests. According to the CFPB, the safe harbor that permits "payments for goods or facilities actually furnished or services actually performed" only applies when goods, services or facilities are "actually provided—typically in the context of particular real estate settlements." According to Ballard Spahr, the CFPB therefore took the position that the safe harbor does not extend to every transfer of "things of value," such as ownership interests in title agencies. It contended that the sale and purchase of such ownership interests can be considered "things of value" paid in exchange for referrals without regard to whether the price paid for the interests was fair. So, according to the CFPB, RESPA's kickback prohibition is violated if the referral agreements between First American and the title agencies were a condition to First American's purchase of ownership interests in the agencies.

In its opinion, the court agreed with the CFPB's position that the safe harbor did not apply to First American's ownership interests. However, the Ninth Circuit stated explicitly that it agreed with the CFPB's interpretation not as a matter of deference but because the CFPB's interpretation was consistent with RESPA's language.

"Since the beginning of the CFPB's amicus brief program, we have voiced our concerns about the program's lack of transparency and the CFPB's use of the program to make law," Ballard Spahr wrote. "We are glad to see that the Ninth Circuit appears to have recognized our concerns by not deferring to the CFPB's attempt to make RESPA law through an amicus brief." ■

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Why You Need a Practices and Procedures Manual and How to Create One

Here's a Three-step Plan to Help Document Your Best Practices

BY JAIME JOHNSON

You must create a practices and procedures manual for your title agency if you want to be able to conduct business in the future. Okay, now that I have your attention, let me explain why. As you already know, the Dodd-Frank Wall Street Reform and Consumer Protection Act (Dodd-Frank) created a new federal regulatory agency called the Consumer Financial Protection Bureau (CFPB). The CFPB issued Service Provider Bulletin 2012-03, which reminded the industry that lenders are responsible for the actions of their service providers, including title agencies.

The CFPB expects banks to oversee their business relationships with service providers in a manner that ensures compliance with federal consumer financial law. The ultimate goal is to protect the interest of consumers. Lenders throughout the country have or are establishing compliance management systems to ensure that their service providers are complying with consumer protection laws. The CFPB considers this oversight of service providers to be a key component of the system. Management of service providers involves the lender's regular and ongoing review of the service provider's policies and procedures in the form of audits.

In order to assist title insurance agents with the increased review and scrutiny that the CFPB is requiring, ALTA created the "Title Insurance and Settlement Company Best Practices." Each title agency that plans to comply with the Best Practices should create specific written policies and procedures tailored to that agency, and follow them.

There are many benefits for every business to document the policies and procedures within a company. The written manuals created from these policies and procedures help an organization run more smoothly while giving clear instructions and guidance to all new employees. They provide a framework of consistency and fairness while defining management's objectives along with the plans and processes to meet those objectives. The policies and procedures manual should be given to all new title agency employees and should be carefully reviewed by new employees as part of the new employee orientation process. The manual sets forth the specific standards and expectations of the agency's employees.

Helpful Resources

ALTA: Utilize the resources available on the ALTA's website (*www.alta.org/bestpractices*), especially the compliance management report, workbooks, checklists and assessment procedures.

Minerva Title Advisors: *www.minervatitleadvisors.com*

Best Practices Plus: *www.BestPracticesPlus.com*

Captiflow: *www.captiflow.com/products.html*

Entrust Solutions: *www.goentrust.com*

Here's How to Do It:

Step 1: Determine the policies your agency needs. Policies should be created to cover every area of a title agency's operations including:

Human Resources: recruiting, hiring, termination and training

Security: security awareness, privacy, and document retention and destruction

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Operations: title examinations and review, accounting/escrow accounts, real estate transaction processes

Step 2: The individual, or management team, drafting the policies needs to fully understand the business practices, functions and operations of the title agency in order to develop solid policies that meet the agency's objectives. Do not blindly follow what you are already doing. Use this as an opportunity to improve your policies.

Document your company's daily, weekly and monthly procedures to create a written title and closing procedures manual. If you do not already have them, create the company privacy, information security and disaster recovery policies. These must be company specific. Keep copies of current licenses (agent, agency and business), completed reconciliations, and insurance and fidelity policies in an easy to retrieve location for auditing purposes.

Policies should be developed with the agency's staff in mind. Employees are more likely to support and follow a policy that makes sense and improves their productivity. Engage your current staff in the policy creation process. Internal or external auditors may need to review your agency policies. Think about the information that needs to be conveyed and anticipate questions auditors may ask regarding the policy. Incorporate the answers to those questions into the policy.

Policies should be in a simple and easy-to-understand format. Keep policies concise and coherent with complete and accurate information. Do not use obscure words or unfamiliar phrases. Keep industry jargon to a minimum and do not use overly technical terms.

Lender Requirements for ALTA Best Practices

To prove compliance with third-party oversight required by the Consumer Financial Protection Bureau (CFPB), several lenders have announced their requirements to prove implementation of ALTA's "Title Insurance and Settlement Company Best Practices." ALTA has compiled information it has received to help title and settlement agents understand the various lender expectations. If you are aware of other lender requirements regarding Best Practices, please share the information on ALTA's blog at *blog.alta.org*. ALTA will update the list as it receives more information.

- SunTrust Bank: Required completion of self assessment by July 1
- Bancorp South: Required third-party certification by July 31
- Trustmark: Required third-party certification by July 31
- Gulf Coast Bank & Trust Co.: Required third-party certification by Sept. 15
- IBERIABANK Mortgage: Required third-party certification by Oct. 1
- American Bank & Trust: Required third-party certification by Oct. 2
- The Mortgage Connection: Required intent to begin certification process by Sept. 30.

Step 3: Plan to spend some time reviewing, editing and refining each policy. Set the policy aside and review it later (at least once before finalizing). The final review should be completed by senior management with the appropriate authority to approve policy content. Each policy should be given an effective date once it has been approved by the agency but before it is communicated to the staff. Be sure to document any staff training that you employ and keep it as part of your Best Practices audit package.

Lender audits and reviews are a required part of the compliance management system. Each audit may differ to some degree depending on the lender, so open up a dialogue about compliance audits with your lender clients as soon as possible. The time you spend up front keeping your documentation organized will save you precious time when the audit notifications arrive.

Review the CFPB's Supervision and Examination Manual, a guide that the supervisory staff of the CFPB uses to examine lenders. It is available to the public online at the CFPB's website (*www.consumerfinance.gov*). Included are several areas specific to the lender's management of service providers. It is well worth the read as you assemble your Best Practices documentation.

Creation of a policies and procedures manual will take time and effort. Any well-run business needs written policies and procedures to achieve its objectives. Written policies and procedures enhance efficiency in the long run and reduce concern for legal issues and other problems. The manual will clearly distill the agency's objectives to benefit employees and clients. Perhaps best of all, it will give your agency the ability to continue conducting business with lenders. ■

Jaime Johnson has been in the title industry over 15 years, and has helped title agencies succeed through multiple lender audits. She recently finished her term serving on the Ohio Land Title Association's Board of Trustees. She can be reached at *jjohnson@minervatitleadvisors.com* or 614-444-7789.

TRID Forces Electronic Processes to Meet New Compliance Requirements

Threat of CFPB Audits May Drive Greater Adoption of E-mortgage Process

BY TIM ANDERSON

From the time the government sponsored entities (GSEs) created the standard Uniform Residential Application form (FannieMae1003/FreddieMac 65) and all the other documents we need to produce a mortgage loan there have always been issues with ensuring the quality, compliance and integrity of data and documents. Then there's the problem of verifying and tracking whether you have the most current version of them. Now with the advent of the TILA-RESPA Integrated Disclosures (TRID) requiring intent to proceed, the three-day delivery rule and receipt of delivery requirements, I don't see how anyone would not finally adopt a paperless, electronic process to show compliance while delivering a better overall consumer experience.

Early in the development of the Consumer Financial Protection Bureau (CFPB), the Mortgage Bankers Association (MBA) via MISMO engaged in educating the bureau on the concept and benefits of SMART (Secure, Manageable, Archivable, Retrievable and Transferable) documents to provide an "intelligent" document format that would allow the flexibility to share and ensure data and document integrity, providing consistency and standards across systems. To its credit, the CFPB listened.

To that end, if you recall early in the initial development of the TRID rule there was a reference to include a "machine readable format" in the reg. The reason it did not make it into the final version was that MISMO 3.3 and now the Federal Housing Finance Agency's (FHFA) Uniform Closing Dataset (UCD) had not been formally approved and published at the time. Well, it is now and the industry needs to understand the reasons why.

The GSE's Loan Quality Initiative Helps Drive Standards

Back in September 2014, the GSEs embarked on a major loan quality initiative (LQI) called the Uniform Mortgage Data Program (UMDP), which includes the Uniform Appraisal Dataset (UAD), Uniform Collateral Data Portal (UCDP) and Uniform Loan Delivery Dataset (ULDD). The GSEs are working on revamping the Universal Residential Loan Application Agreement (URLA) to ensure greater data quality, integrity, consistency and control for all parties.

As with Loan Prospector and Desktop Underwriter, Fannie Mae and Freddie Mac could have created their own proprietary format. However, the GSEs have embraced the MISMO version 3.x model, which addresses many of the data integrity issues of previous versions. Fannie and Freddie will leverage the upcoming MISMO version 3.4 for the Uniform Residential Loan Dataset. So, just like the UAD, any document that you want to confirm and verify data compliance, can be made SMART.

Getting the Data Right

One of the key advantages to having a data standard is making sure your calculations are current, correct and compliant. To use an existing example that all should be familiar with, back in 2010 the FHFA issued the UAD requirement, but it did

A lot will happen between today and October 3, 2015.

Rates will go up, stay the same, or fall - who knows? Someone will land that big client - we hope it's you! There will be lots of dinners, and even more meetings. There will be vacations to the beach, to the mountains, to the lake, to the river, or overseas.

A lot will happen between today and the third day of October. However, we recommend you take time to ...

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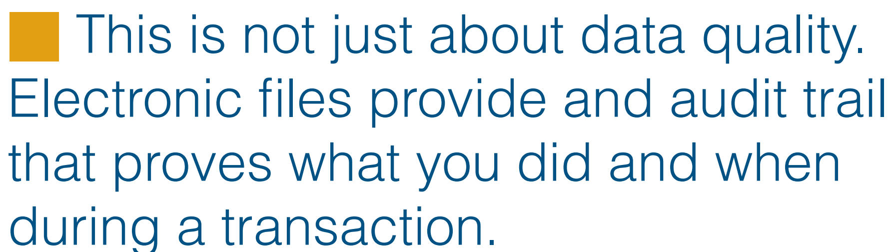
not originally mandate that the document submissions include the MISMO 2.6 XML data payload.

At the beginning, many of the appraisal documents submitted to the UCDP were "dumb" PDF documents. Three years after the requirement was published, the GSEs were still finding issues on almost 18 percent of the appraisal documents submitted in PDF format. It wasn't until July 2014 that the GSEs announced that they would no longer accept appraisals in PDF format, allowing only uploads of the MISMO version 2.6 XML format (UAD) as the primary source document. Due to issues of data quality and consistency from a PDF extraction, the GSEs have seen significant improvements with collecting the data in UAD XML format.



Getting Data in the Right Fields

One of the issues with the new disclosure forms is that the CFPB eliminated the old HUD-1 fee line detail and replaced it with an "alphabetical" listing of the fees. This may be more "user friendly" to the consumer, but it creates issues with lenders to ensure that the right data gets to the right buckets to ensure accurate and compliant calculations on the GFE and TIL. In order to solve this issue, the MBA worked with ALTA members through the ResTech Committee to create a Fee Terminology workgroup charged with developing consistent fee descriptions (much like we had to do for the UAD) to ensure what a title agent called a fee and what the lender called and where it was placed the fee were applied consistently on the new forms.

Providing a Replicable, Auditable and Verifiable Loan File

One of the goals of the CFPB was to implement a data standard that could be used and repurposed to not only create standardized reports and view historical trends and records, but also provide a standard and consistent method to electronically audit the loan file for future compliance audits. In support of the Paper Reduction Act and in order to create a more consistent and accurate automated loan audit review process, the CFPB has made it clear that they do not want to audit and review paper loan files. Hopefully in the near future, instead of an army camping out in your office for six weeks and totally disrupting your operations, we will see the ability to electronically send the bureau the MISMO data file (along with supporting documents) to be systematically auto-verified in seconds.

If you recall, this was the goal of Fannie Mae to enable Qualified Mortgage (QM) eligibility and receive a three-year rep and warrant against repurchase. Fannie Mae intended to audit 100 percent of the data files to ensure compliance 90 days after the loans closed. The only issue, however, is that the GSE did not have a system or a consistent data format at the time to perform this. This can be accomplished with the MISMO 3.3 data file and UCD.

Record Retention Requirements

With TRID, there is a three-year requirement to retain the Loan Estimate (LE) and five years to keep the Closing Disclosure (CD) to provide an electronic record of evidence to protect the lender against any future claims of non-compliance. The $50 billion national mortgage servicing settlement taught us that relying on the paper file to document and defend against future lawsuits on transactions that occurred years ago is just not realistic.

A Full Electronic Compliance Process

This is not just about data quality. Electronic files provide an audit trail that proves what you did during a transaction and when it all happened. The 2010 RESPA reform introduced the initial three-day (72-hour) disclosure requirement for the initial loan disclosure package. TRID implements a similar rule requiring proof that the Closing Disclosure be delivered and received three days prior to closing.

Many will default to the three-day mailbox rule, but the other requirement is that the creditor must allow for an additional three days for the consumer to read the document. At the very least, this means at least a six-day delay in closings. Again, all this is primarily focused on a paper process for delivering the Closing Disclosure.

Do It for One, Why Not for All?

Now if you implemented an e-disclosure process, you could close the loan with certainty in three business days (for all documents) and not have to worry about rate-lock extensions. And because you now have a date- and time-stamped audit trail documenting all activities and events, you would also retain better electronic evidence (proof) of delivery than the antiquated paper process. During our participation in the CFPB e-closing pilot program, we found that 98 percent of borrowers preferred to receive initial disclosures electronically versus paper. Why wouldn't you do the same for the closing package as well? Allowing consumers to view and e-sign lender documents in advance of closing means fewer questions, issues and errors at closing. This reduces the overall closing time, even if you paper out and wet sign the remaining documents that need to be notarized and recorded. From the investor side, this significantly reduces post-closing data and document issues that might prevent them from immediately funding the loan.

Electronic Evidence

Start and remain electronic. A benefit of offering a complete electronic process (from application to closing) is that each document and event creates an electronic (date and time stamp) audit trial.

This will not only show who the documents were delivered to but also when they were delivered, whether the files were actually opened and even when they were e-signed. This is a streamlined process that can't possibly be replicated in the paper world.

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Third-Party Origination and Investor Requirement

Now, everyone is on the hook to verify compliance. Before the Dodd-Frank Act, most investors only required that 10 to 20 percent of the loans needed to be verified. That is because they were still processing "dumb" paper or PDF documents. Now, with SMART documents you can automate 100 percent of the audit and verification process to check for high cost, APR, GFE, TIL and RESPA tolerance and literally thousands of other requirements to ensure compliance before documents are drawn and delivered.

This electronic compliance audit, along with the originator source data that was used to create the documents, can now be delivered to the investor to prove compliance years after the loan has closed. If the industry had implemented this process prior to the financial meltdown of 2008, most servicers would have been able to document and prove compliance and save virtually billions of dollars in fines and lawsuits that continue to this day.

Consumer Benefits

- Consumer is engaged and has full visibility of the process from application to closing
- Ability to embed information helps provides for a more informed and better-educated consumer
- Ability to read and execute documents three days prior to closing eliminates questions and surprises at closing (a benefit to all)

Lender Benefits

- Expedited process, greater efficiencies, reduced time, cost and compliance risk
- Automated verification (VOI, VOD, VOE)
- Solves another CFPB requirement to implement an automated CMS (Compliance Management System) to ensure compliant process.
- Time to correct issues prior to closing
- Electronic audit record provides electronic proof of evidence for compliance, verification, audits and defense
- Delivers superior customer service and experience
- Competitive advantage and market differentiator

Investor Benefits

- Increased loan quality, greater predictability, reduced post-closing time and cost
- Quicker funding with less post-closing issues and exceptions

Industry Benefits

- Increased automation, less manual paper handling and underwriting
- Greater predictability with fewer issues across the board
- Increased trust of data and documents (intelligent docs)
- More consistent automated flow and process
- A verifiable, replicable and auditable file and process (Reg Z)
- Five-year record retention requirement (Reg X)

In this new era of compliance, it's amazing to see lenders still clinging to and insisting on generating paper or even "dumb" PDF documents with all their inherent costs, inaccuracies and inefficiencies in this new era of compliance.

Maybe it's going to take a few CFPB audits and fines like it did on the servicing side to convince lenders to support a true e-mortgage process. ■

Tim Anderson has more than 30 years of industry experience and is director of e-services for DocMagic Inc. He's served on advisory boards of Freddie Mac, Fannie Mae, Microsoft and the Housing Roundtable. He can be reached at *tim@docmagic.com*.

Advanced Property Research Meets Superior Customer Service

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Advanced Property Research

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Superior Customer Service

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Wells Fargo Outlines Timelines for TRID Closings

Settlement Agents Can Expect to Begin Collaborating With Lender 10 days Prior to Closing to Exchange Fees

In its September newsletter, Wells Fargo outlined target timelines to help ensure closings continue smoothly following implementation of the TILA-RESPA Integrated Disclosures on Oct. 3.

Settlement agents can expect to begin communication with Wells Fargo closers 15 business days prior to the closing. Target timelines are expressed in business days, using the same definition of a "business day" that is defined in the rule for receipt of the Closing Disclosure. When the target timeline falls on a Saturday, Wells Fargo indicated that the activity should occur on the preceding non-holiday weekday.

At this point in the transaction, a Wells Fargo closer will synchronize information with the settlement agent and confirm the closing date and signing plans. Settlement agents are reminded to inform Wells Fargo as soon as possible of any transaction changes, such as revised contract terms or seller credits.

Ten days prior to closing, collaboration will begin between Wells Fargo's closer and the settlement agent to exchange fee information and other content needed for Wells Fargo to prepare the Closing Disclosure.

Wells Fargo reminded settlement agents to use Closing Insight for this collaboration to provide fees. Settlement agents are also encouraged to confirm that the email address and wire information to be used have been approved by Wells Fargo to ensure loan documents and funds can be received.

Wells Fargo indicated that the Closing Disclosure will be finalized and approved seven business days prior to closing. This will be required to ensure Wells Fargo meets the presumed receipt provision of the rule.

TRID Questions?

Have questions or issues about TRID? Email us at *tridhelp@alta.org*.

The homebuyer must receive the Closing Disclosure at least three days before the closing. Wells Fargo will track delivery of the Closing Disclosure to prove compliance.

According to Wells Fargo, loan closing documents will be made available through eLynx/EDD within one or two days in most cases after the borrower's Closing Disclosure is finalized. Settlement agents are reminded to encourage borrowers to review the Closing Disclosure prior to the closing and contact Wells Fargo with questions.

Settlement agents should follow Wells Fargo closing instructions to execute the loan and delivery of final documents. Early document signing will not be permitted without authorization from Wells Fargo. Wells Fargo will provide an updated Closing Disclosure if changes are made. The lender reminded settlement agents that they should not modify the borrower's Closing Disclosure or issue their own version.

Settlement agents must provide copies of the seller Closing Disclosure and other settlement statements applicable to the transaction to Wells Fargo with the closed loan documents. ■

Ohio-based Title Agency Files Federal Suit Against Indiana DOI

American Homeland Title Agency (AHT) has filed a civil rights lawsuit against the commissioner of the Indiana Department of Insurance (IDOI).

Filed in the United States District Court in Cincinnati, Ohio, the suit alleges that the Indiana title insurance laws and regulations have been selectively enforced in violation of the U.S. Constitution by the IDOI commissioner.

According to the complaint, the IDOI told AHT that "If you guys were not writing this (title insurance) business in Indiana, people in Indiana would be writing it." This is unconstitutional discrimination against out-of-state title companies in favor of in-state title companies, the lawsuit states. As the result of an audit performed by IDOI in January 2015, AHT was accused of making errors in handling Indiana real estate transactions. Throughout the audit process, according to AHT, the department of insurance failed to follow Indiana state law. IDOI did not allow AHT the opportunity to receive and to rebut the findings of the audit. AHT decided to settle with the state of Indiana rather than risk the entire company on a protracted legal fight.

"I am aware that several major companies in the Cincinnati area have voluntarily ceased doing business in Indiana as a direct result of the fear of aggressive and selective enforcement by IDOI," said John Yonas, president of AHT.

HA&W to Refund Fee if Lender Rejects Best Practices Compliance Report

HA&W announced that it will provide title agents with a financial safety net for their compliance reports.

ComplianceSuccess provides the title and settlement industry reporting options to demonstrate compliance with ALTA's "Title Insurance and Settlement Company Best Practices," either by a review, an examination or a Service Organization Control (SOC) report. The accounting firm pledges to charge for only the incremental work necessary to reissue a report if ALTA updates its Best Practices Assessment Procedures within six months of the issuance of an HA&W report.

Nevada Expands Definition of Personal Information

A bill that amends Nevada's laws on security of personal information went into effect July 1.

Signed May 13 by Gov. Brian Sandoval, Assembly Bill No. 179 amends Nevada Revised Statutes § 603A.040, which defines "personal information."

The definition of personal information now includes:

- *driver authorization card numbers*
- *usernames, unique identifiers or e-mail addresses, in combination with a password, access code, or security question and answer that would permit access to an online account*
- *medical or health insurance identification numbers*

Previously, Nevada defined personal information as the combination of an individual's first name or initial, last name, and one or more of the following:

- *a Social Security number*
- a driver's license or identification card number
- an account number, credit or debit card number, in combination with any required security code or password that would permit access to the financial account

AB 179 also limits the public information exclusion of personal information, restricting it to publicly available information "from federal, state or local governmental records."

RedVision Completes SOC 2 Security Control Standards Exam

RedVision, a national provider of title and real property research solutions, announced it has completed a Service Organization Controls 2 (SOC 2) Type 1 standards of control examination. This independent affirmation confirms that RedVision's critical controls are effectively managing the security, availability and confidentiality of client information. The SOC 2 is based on Trust Services Principles, which according to the American Institute of Certified Public Accountants (AICPA), "helps differentiate entities from their competitors by demonstrating to stakeholders that the entities are attuned to the risks posed by their environment and equipped with the controls that address those risks."

Rynoh*Live* shows you the fraud and theft risk that lurk just out of sight.

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Fortune Names First American as 10 Best Workplaces in Insurance

First American has been named as one of the 10 Best Workplaces in Insurance by *Fortune* and Great Place to Work. The ranking is the result of an anonymous survey of more than 86,000 employees administered by Great Place to Work, a global authority on workplace cultures.

"Listening to our people and providing them with opportunities to excel are central to our success. The integrity, commitment and teamwork our people demonstrate every day has earned First American a reputation for leadership and innovation in the title insurance and settlement services industry," said Dennis Gilmore, CEO of First American Financial.

Inc. Magazine Names RynohLive One of the Fastest-growing Companies in America

RynohLive was ranked No. 1022 on *Inc. Magazine*'s annual list of the fastest-growing private companies in the United States.

Over the past 34 years, *Inc. Magazine* has ranked companies according to their percentage revenue growth over a three-year period starting in 2011. Notably, Rynoh had a three-year growth percentage rate of 428 percent and revenue of $2 million in 2014.

"We are thrilled to be included in the Inc. 5000 list this year," said Dick Reass, RynohLive CEO and founder. "We have focused on building a unique and innovative solution for the settlement industry that ensures both security and compliance. Our continued dedication to delivering a powerful solution has paid off tremendously."

String Real Estate Information Services Receives SOC 2 Certification

String Real Estate Information Services, a provider of services to the title and mortgage industry, has obtained an SSAE16 SOC 2 Type 2 certification. The SOC 2 audit required an in-depth assessment of the internal controls, policies and procedures related to all of String's services and facilities for a period of six months. The SSAE16 SOC 2 certification adds to String's existing certifications, including the ISO27001 and the SSAE16 SOC 1.

TitleOne Acquires Competitor in Idaho

TitleOne announced the acquisition of Sun Valley Title Company, a Blaine-County, Idaho-based company with locations in Ketchum and Hailey, and a history of providing title and escrow services since 1907.

According to TitleOne CEO Mark Tidd, Sun Valley Title is the perfect fit for TitleOne in terms of geographic desirability, history and customer service.

"Adding Sun Valley Title to the TitleOne family will expand our servicing capability into more counties, with new locations and the addition of an outstanding team," Tidd said. "The Sun Valley Title team has a long-standing history of delivering outstanding service to the Blaine County market—which is aligned with TitleOne's commitment to our team and customers throughout Idaho."

The company will continue to operate under the Sun Valley Title brand for the near future. In addition, Sun Valley Title team members will become part owners of TitleOne, and retain their current positions. Cassie Jones, Sun Valley Title's manager, will continue to lead operations.

Benchmark Title Receives Certification to ALTA Best Practices

Benchmark Title Company LLC received certification in accordance with ALTA's "Title Insurance and Settlement Company Best Practices." National Certified Public Accounting and consulting firm Pershing, Yoakley & Associates (PYA) undertook the assessment and issued the certification.

"Many title insurance and settlement companies claim to be 'certified,' but many of these certifications are either self-proclaimed or provided by third parties that lack the credentials of a national accounting firm" said Michelle Null, vice president at Benchmark Title. "We felt it was important to work with a national accounting firm that had a thorough understanding of the ALTA Best Practices and CFPB regulations."

The Best Practices certification, which is good for two years, established that the firm is adhering to documented operational policies and procedures that reflect compliance with all of the ALTA Best Practices.

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Dominicana N. Roberts
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Linda Rose
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Michael Savas
First American Title Insurance Company

Eric Schibi
Field Abstract & Title

Tom Schlesinger
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Shari Schneider
Stewart Title Guaranty Company

Roberta Schneider
Fidelity National Title Group

Eric Schneider
Lakeside Title Company

Ronnie Semlak
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Joe Shepherd
Fidelity National Title Group

Rob Sherman
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Wayne Shupe
Old Republic National Title Insurance Company

Bob Sink
First American Title Insurance Company

Nicole Skalka
Old Republic National Title Insurance Company

Judi Souza
Escrow Expertise

Paul Spano
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Michael Stogdill
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Brian Stone
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ANTIC

Joe Tavarez Jr.
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Brett Waterman
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Phillip Wert
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Jeffrey Wiener
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Laura Wild
First American Title Insurance Company

Robert Wineman
Fidelity National Title Group

Dan Wold
Old Republic National Title Insurance Company

Ronald Wood
Fidelity National Title Group

Brooks Yeager
RamQuest

Numbers Don't Lie

Nearly six years ago, the title industry prepared for the previous RESPA reform and regulations that required the use of a new Good Faith Estimate and HUD-1 forms. The final rule for that regulation printed in the Federal Register came in at 86 pages.

Oh, how times have changed. Now, we are contending with a much more massive regulation in the TILA-RESPA Integrated Disclosures (TRID). This regulation is a whopping 637 pages in the Federal Register.

During this same timeframe, ALTA membership has skyrocketed. With the title industry needing enhanced advocacy, companies needing new resources to prove compliance and education to stay on top of the changing regulatory and legislative landscape, ALTA responded. Title professionals have noticed. Since 2009, ALTA membership has nearly doubled and we are on the verge of passing 6,000 member companies. This will be the fifth consecutive year that ALTA has set a new mark for membership. That's simply amazing.

By being a member—not only do you strengthen the industry's future—you gain access to an array of resources to help your company differentiate itself in the market. We want to make sure you get the most out of your membership.

In addition to ALTA's Policy Forms License, your membership includes our monthly magazine, TitleNews—in print and digital format—along with weekly email updates and monthly webinars to keep you informed about industry developments. You also receive discounts on ALTA meetings and other educational materials and have the opportunity to connect with key professionals in the industry and serve on committees. There's also unfettered access to TRID and Best Practices resources, as well as all the items available in the Homebuyer Guide to educate consumers about the benefits of title insurance. Members companies also are listed in Home Closing 101 directory, which connects your company with consumers looking for closing services and title insurance.

We look forward to providing you with the tools and educational resources to help you achieve your business goals and objectives over the next year. We thank you for your membership. As a united industry we can do great things. Numbers don't lie.

— Jim Stipanovich NTP, chair of ALTA's Membership Committee

Celebrating 25 Years of Service to ALTA Members and the Title Industry!

Times were tough for title professionals in the 1980s. Like today, E&O insurers were either ceasing to offer coverage or raising rates dramatically. To respond to this crisis, ALTA members created Title Industry Assurance Company (TIAC) to provide a long-term stable E&O market for its members.

25 years later, TIAC is one of the longest running and successful E&O insurance providers available! Combining broad coverage, expert claims and underwriting services, and competitive rates, TIAC is the choice for title professionals!

If you have not received a quotation from TIAC lately or compared our broad coverage, contact us at 800-628-5136 or complete our online premium estimate form at *www.tiacrrg.com*.

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