October 2016

TitleNews

Official Publication of the
American Land Title Association

10 Lawsuits You Can't Ignore

ALTA's Title Counsel Summarizes Key Cases and Explains Relevance of Decisions to Title Industry

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contents

TitleNews • Volume 95, Number 10

10
COVER STORY
10 Lawsuits You Can't Ignore
ALTA's Title Counsel Summarizes Key Cases and Explains Relevance of Decisions to Title Industry

Features

21
REGULATION
Survey: TRID Title Insurance Fee Disclosure Confuses Consumers
Online Survey of 2,000 Consumers Reinforces Need to Correct Inaccurate Disclosure of Title Premiums

24
M&A ACTIVITY
Deals, Partnerships Continue in Title Space
TRG Expands in Idaho; Two Florida Firms Join Forces; National Title Makes Move in Minnesota; First American Acquires RedVision

27
REGULATION
FTC Seeks Comments on Safeguards Rule
Information Security Protocols in ALTA's Best Practices Based On the Rule

29
ORIGINATION VOLUME
Commercial, Multifamily Originations Remain Strong in Q2
Volume Holds Stead Compared to 2016

31
INDUSTRY NEWS
Colorado Bans MSAs in Title Industry
Regulation Only Prohibits MSAs Involving Title Companies

Departments

5
From the Publisher's Desk

6
ALTA News

8
@altaonline

31
Industry News

33
TIPAC Contributors

38
The Last Word

calendar

2017 ALTA CONFERENCES

February 23-24	Innovation Boot Camp *Denver, CO*
March 8-10	ALTA SPRINGBOARD *Fort Worth, TX*
May 8-10	Advocacy Summit *Washington, D.C.*
October 10–13	ALTA ONE *Miami, FL*

STATE CONFERENCES

October 13 - 16	Wisconsin Mackinac Island, MI
November 9 - 11	Florida St. Augustine, FL
Nov. 30 - Dec. 2	Louisiana New Orleans, LA

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

Connect With Consumers

The digital edition of TitleNews includes a webinar recording of "Consumer Outreach and Education: Yes It Does Work," which highlights all the free marketing content that's available to members.

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

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AMERICAN LAND TITLE ASSOCIATION

What's Your One Thing?

We are busy. Every one of us can talk about being bombarded by emails, phone calls, texts, and meetings. The various and simultaneous demands distract us from our most important work, if we even take the time to think about what our most important work should be. While we all want fewer things sidetracking us, there's an innate desire to do and achieve more. It's a perplexing dichotomy.

In the book *The One Thing*, Gary Keller details how to limit the distractions and achieve more. His book opens with a Russian proverb that says "If you chase two rabbits, you will not catch either one." So true. What follows is a simple path to achieving results for what is most important to you. It resonated with me when I thought back on times when my work has been effective.

Think about times when you have excelled. You've probably achieved great success when you narrowed your concentration to one thing. Results were likely muddled when your focus wandered.

Defining your One Thing isn't easy. It's hard to let go of the things we've convinced ourselves that matter. This extra noise blurs our thinking and sidetracks success. Everything that must be done is not equal. The book encourages us to avoid being "busy," and focus on being productive. Robert Koch highlights this philosophy in his book *The 80/20 Principle,* based on the Pareto Principle, which asserts that "a minority of causes, inputs or effort usually lead to a majority of the results, outputs or rewards." What does this mean to you? The majority of what you want will come from the minority of what you do. So, a to-do list can become a success list if it's prioritized.

As your trade association, there are many issues we could focus on. But to be effective, as the *One Thing* stresses, we must narrow our attention. To do this, ALTA's Board of Governors and executive team develop our strategic priorities each year. This is our One Thing. By constantly returning to the strategic priorities, the entire association is focused on the key topics that will affect our members in their business and regulatory environment.

So, what's your One Thing? We'd like to hear from you. We'll post this column to our blog (*blog@alta.org*) where you can share your One Thing. Here are a few questions to help you get focused:

- What's the One Thing I can do to relieve my stress?
- What's the One Thing I can do to further my career?
- What's the One Thing I can do to make my company more competitive?
- What's the One Thing I can do to improve our customer experience?

By cutting through the clutter and concentrating on what really matters, you'll achieve exceptional results. Strive to prioritize. The rest will fall into place. Success is built sequentially—One Thing at a time.

— Michelle Korsmo, ALTA chief executive officer

Connecting With Consumers: ALTA's Manifesto

As part of its Homebuyer Outreach Program (HOP), ALTA created the Homebuyer Guide to help members easily communicate the benefit of owner's title insurance to homeowners, real estate agents, lenders and others.

Included in the Homebuyer Guide are more than 60 free resources, including blog content, sample social media content, marketing one-pagers, rack cards, print advertisements, rich-media ads and Power Point presentations. ALTA members have exclusive access to all of the material.

A popular item among ALTA members across the country is the ALTA Manifesto. The Manifesto in an inspirational piece highlighting many of the valuable services the industry performs to provide peace of mind to consumers. This resource can be printed as a flyer or poster.

To customize, print or download material, go to *ALTAprints.com*.

How are you are connecting with consumers and using the content in ALTA's Homebuyer Guide? Share your stories by emailing *communications@alta.org*.

ALTA Staff Elected to PRIA, PREP Positions

Kelly Romeo, vice president at ALTA, was elected to the Board of Directors of the Property Records Industry Association (PRIA), which develops and promotes national standards and best practices for the property records industry.

Romeo, who joined five others who were elected to two-year terms, was elected as a director in the business category. She previously served on PRIA's Board.

Meanwhile, Ben Lincoln, ALTA's director government affairs, was elected as the new business co-chair for Property Records Education Partners (PREP), which provides a local structured forum for stakeholders of the property records industry.

HOP Workshop Scheduled in Texas

ALTA and the Texas Land Title Association (TLTA) have partnered to host a Homebuyer Outreach Program Workshop from 1:00 to 5:15 p.m., Dec. 7 at the Hyatt Sun Country Resort in San Antonio. This event will be a pre-conference event for the TLTA Land Title Institute.

The program will help attendees:

- *Build better relationships with homebuyers earlier in the transaction*
- *Communicate the benefit of owner's title insurance more effectively*
- *Reach more homebuyers using customized outreach materials*
- *Reduce costs by learning advertising best practices and pitfalls*

For more information and to register, go to *www.tlta.org/land_institute.aspx*.

Q2 2016 Title Premium Volume Up Nearly 4 Percent

ALTA reported title insurance premium volume increased 3.9 percent during the second quarter of 2016 when compared to the same period a year ago.

The title insurance industry generated $3.5 billion in title insurance premiums during the second quarter of 2016 compared to $3.4 billion during the second quarter of 2016, according to ALTA's Market Share Analysis.

On a state-by-state basis, 41 states, plus the District of Columbia, showed written premiums increasing from during the latest quarter compared to the same period a year ago.

Family Market Share

Fidelity	35%
First American	26%
Old Republic	14%
Stewart	11%
Independents	14%

Top States

Texas	$505 million
California	$446 million
Florida	$343 million
New York	$261 million
Pennsylvania	$135 million

For more market share data, go to *www.alta.org/industry/financial*. ALTA expects to release its third-quarter 2016 Market Share Analysis around Dec. 1.

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2016 Title Trick-or-Treat

Beginning Oct. 17, ALTA will post several trivia questions and crossword puzzles as part of our Title Trick-or-Treat promotion. Individuals who complete the crossword puzzles and correctly answer the trivia questions will be entered to win a prize package of ALTA swag. Be on the lookout for some tricks along the way! Participate daily for your chance to win a free “Keep Calm & Love Title” t-shirt!

Social Media Pro-Tip: Engage with Consumers Today

Homebuyers demand more information and education than ever before. Our 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. This is why it’s important to reach out to homebuyers earlier in the real estate transaction.

ALTA’s Homebuyer Guide has resources for all companies 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.

Be sure to check out the Spanish Suite of HOP materials to reach even more individuals in your market!

Learn more at *www.alta.org/homebuyer*.

If you have questions or need any help, email us at *social@alta.org.*

#12DaysofTitle is Coming

Back again by popular demand—#12DaysofTitle is just two months away! What are you most proud of in the land title insurance 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 each day? Email us your thoughts at *social@alta.org* using #12DaysofTitle. Some of your responses may be included on ALTA’s Facebook and Twitter accounts!

Texas Homebuyer Outreach Program Workshop

ALTA is proud to co-host our Texas Homebuyer Outreach Program (HOP) Workshop with the Texas Land Title Association (TLTA). We’re excited to offer four hours of education on Wednesday, Dec. 7, in San Antonio. Guest speakers will include Lisa Steele (Mother Lode Holding Company) and ALTA Board Governor Jack Rattikin (Rattikin Title). Visit *www.tlta.com* to register.

ALTA’s Homebuyer Outreach Program

Did you miss our March Title Topics webinar on ALTA’s Homebuyer Outreach Program (HOP)? Check out our Title Topics archives to hear from industry experts on the new resources available for ALTA members, including ALTA’s newest benefit, *ALTAprints.com.* A recorded copy of the webinar is available at *www.alta.org/titletopics*.

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10 Lawsuits You Can't Ignore

ALTA's Title Counsel Summarizes Key Cases and Explains Relevance of Decisions to Title Industry

Prudent owners and managers of title operations spend time diligently reviewing production metrics to maximize profit. Many don't follow or consider the impact litigation and court decisions could have on their operations. Unfortunately for title professionals, this is an area of growing concern as litigation is on the rise. The "2016 Litigation Trends Annual Survey" from Norton Rose Fulbright reveals an upward trend in virtually all of the metrics relating to litigation. An increased volume of regulation is resulting in the threat of more regulatory disputes, resulting in the rise in expenditures to resolve issues. The 12th annual survey of 606 corporate counsels found that 24 percent believe the volume of disputes will increase in the year ahead. >>

To keep members informed of important decisions in courts across the country, members of ALTA's Title Counsel and others provided a synopsis of 10 lawsuits they believe have significant implications on the land title industry. From state supreme courts around the country and various other courts, the lawsuits dealt with a wide range of issues including date of loss, forged deeds and time limits, bad-faith claims, duty of care to third parties in recording of legal instruments, borrowers challenging wrongful foreclosures, spousal rights involving reverse mortgages, junior liens, liability to non-insured third-party beneficiaries, marketable title after tax deed sale and corporate seals on title policies extending statute of limitations.

While a decision may not be in a title professional's particular market, the case law could be used as examples for other courts.

"Knowing about these key decisions can prove helpful in protecting a company against any unexpected liabilities," said Marjorie Bardwell, chair of ALTA's Title Counsel and director of underwriting services of Fidelity National Title Group. "Decisions in these cases could indicate a trend in the interpretation of these legal issues, so it's important all title professionals understand the implications even if the rulings are not from their state or jurisdiction. Because of Title Counsel's efforts, ALTA members have access to 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 lawsuits, the court's decision and relevance to the title insurance industry.

Arizona Supreme Court Rules Against Insurer on Date of Loss Issue

Citation: *First American Title Ins. Co. v. Johnson Bank,* --- P.3d ---, 2016 WL 3247545 (Ariz. 2016)

Facts: First American Title Insurance Co. issued Loan Policies for deeds of trust on two different properties. The policies did not except certain covenants, conditions and restrictions (CCRs) recorded against the property that prevented its commercial development. The borrowers defaulted on their loan obligations. In 2010, Johnson Bank foreclosed and took title to the properties. After the foreclosure, Johnson Bank made claims under the lender's policies that the CCRs prevented the properties from being developed for commercial purposes and the CCRs were not exceptions to coverage under the policies.

The parties disagreed over the date for calculating the diminution in value as a result of the CCRs. Johnson Bank argued for using the date the loans were issued. First American contended damages should be calculated as of the date of the foreclosure, which was after the real estate market had declined precipitously.

The parties filed cross-motions for summary judgment and the trial court granted summary judgment in favor of First America. The court of appeals reversed, holding that, absent an express date in the policies, the date to measure any diminution in property value is the date of the loan, and remanded the case for entry in favor of Johnson Bank.

Holding: After analyzing the policies in light of the legislative goals, social policy and the parties' transaction, the Arizona Supreme Court found section 7(a)(iii) of the policies was ambiguous as to the date as of which diminution in value is to be calculated, and should therefore be construed against the insurer, First American. The Arizona Supreme Court rejected First American's argument that the date of foreclosure is the only reasonable date of valuation because the lender must foreclose in order to incur and claim a loss. Reviewing cases from around the country, the Arizona Supreme Court identified a line of cases that used the date of foreclosure as the date of valuation, but, those cases, it noted, involved undisclosed superior liens as the underlying title defect. The court held that, in those cases, it may well be appropriate to value the loss as of the date of foreclosure because the damage results from the insured lender not having priority, but refused to generalize that scenario to all circumstances. Instead, it adopted a case-by-case approach to identifying the date for valuing the loss.

The Arizona Supreme Court held that the policies implicitly permit the use of the date of the policy as the date for calculating damages under section 7(a)(iii), "if the title defect caused the borrowers/owners to default on Johnson Bank's loans." It vacated the appellate court opinion and remanded the matter to the trial court, however, agreeing with First American that there was no evidentiary support in the record that the title defect had caused the borrowers' default.

Justice C.J. Bales dissented, arguing that the majority, by reasoning that First American had caused the lender consequential damages by conducting a deficient search and failing to disclose the CCRs, was effectively imposing an abstractor's duty to disclose on a title insurer. Such a duty is not, according to Justice

Bales, authorized by the policies, which contemplate an actual loss that cannot be incurred by a lender until foreclosure.

Importance to the Industry: The Arizona Supreme Court's opinion appears to revise the reasonable assumptions of the parties evident in and underlying title insurance policies in order to construe those policies against title insurers and hold them liable for market declines. Moreover, the opinion creates another unnecessary problem, as it remains unclear how a title defect can cause a borrower to default or what evidence would be required in order to show this. None of this is addressed in the opinion or the Loan Policy and trial courts will in effect have to make it up after the fact. Thus, this opinion, as the dissent points out, threatens to impose an extra-contractual liability on title insurers for a loss that the lender is in the best position to evaluate at the time of the loan. While the 2006 ALTA Loan Policy addresses this issue, giving the insured lender the option of having the loss valued as of either (i) the date the claim is made or (ii) the date the claim is settled and paid, the Arizona Supreme Court's opinion will nevertheless still have a significant impact.

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New York Court Holds Forged Deed Claims Not Subject to Time Limits

Citation: *Faison v. Lewis, et al, 25 N.Y.3d 220, rearg. denied,* 26 N.Y.3d 946 (2015)

Facts: Faison and Lewis are first cousins. Faison's father and Lewis's mother had each owned a one-half interest in a property. Lewis's mother conveyed her half-interest to Lewis by a deed duly recorded in July 2000. In February 2001, a "correction deed" was recorded by which the grantor in the first deed was changed from just "Lewis's Mother" to "Lewis's Mother and Faison's Father" and purported to convey the entire ownership to Lewis. Faison's father passed away soon thereafter.

In 2002, Faison filed an action pro se to void the correction deed based on forgery. The action was dismissed because Faison was not the administrator of her father's estate. She alerted the attorney for the administrator, who assured her he would pursue the claim. He did not do so.

In 2009, Lewis borrowed $269,000 from Bank of America, securing the loan with a mortgage on the property. In July 2010, Faison was appointed successor administrator of her father's estate. She commenced a new action to void the correction deed soon thereafter. Bank of America moved to dismiss because the statute of limitations had expired.

Holding: Both the trial court and the intermediate appellate court adhered to long-standing precedent that the six-year statute of limitations for fraud applied to forgery claims. Even under the most liberal application of the discovery rule, Faison commenced the second action more than six years after discovery of the fraud.

In a 4-3 ruling, the Court of Appeals declared that "a claim against a forged deed is not subject to a statute of limitations defense." Despite an impassioned dissent by the chief judge, the majority swept away more than a century of black letter law. The majority clearly believed its intervention was required "to ferret out forged deeds and purge them from our real property system." It determined "there is no reason to impose barriers to those who seek to vacate such deed[s] as null and void" in part because forgeries "undermine the integrity of our real property system…."

Importance to the Title Industry: This ruling is a dramatic departure from established New York precedent. It is contrary to the plain language of New York's exhaustive statutory provisions concerning statutes of limitation, as well as the overwhelming weight of authority from other U.S. jurisdictions. Most important, it exposes New York title insurers to expanded defense liability on the mere allegation of forgery, and expanded indemnification liability on stale claims, with no possibility of repose. Widespread adoption of this approach could signal a dramatic expansion of risk for the title insurance industry.

Lance Pomerantz is a New York sole practitioner who focuses exclusively on land title issues. He was retained as a consultant on the motion for reargument in the Faison case. He can be reached at lance@landtitlelaw.com.

Hawaii Supreme Court Addresses Bad-faith Claim

Citation: *Anastasi v. Fid. Nat. Title Ins. Co., 366 P.3d 160* (Haw. 2016).

Facts: The insurer issued a policy insuring a $2.4 million mortgage. Five months later, the previous owner of the mortgaged property filed a lawsuit claiming his signature on the deed to the borrower had been forged. The insured sought coverage, which the insurer agreed to provide under a reservation of rights. Within a month, the insurer's analysis revealed that the

signature on the allegedly forged deed was "very different" from the seller's actual signature, and that the driver's license information recorded by the notary at the closing didn't match the seller's actual driver's license.

The insurer, however, believed the real owner of the property may have conspired with the purchaser to defraud the lender out of $2.4 million. Thus, counsel pursued the litigation on behalf of the insured, but the insured eventually lost on summary judgment. Retained counsel filed an unsuccessful motion for reconsideration and, at the insurer's recommendation, an appeal. The parties settled while the appeal was pending, and the insured filed this action against the insurer in which it alleged the insurer acted in bad faith by litigating when it had no reasonable basis for doing so. During the action, the insured filed a motion to compel the production of certain documents generated by the insurer's in-house claims counsel, which the trial court denied because it found that they were privileged. The trial court then granted the insurer's motion for summary judgment, finding the insurer had not acted in bad faith in litigating the matter. It also found no evidence that the insurer controlled the retained counsel's handling of the litigation, and that any alleged delay by retained counsel therefore was imputed to the insured. On appeal, the appellate court reversed the trial court on the motion to compel, holding that there was a presumption that any documents produced before the insurer made a coverage determination were not privileged. The appellate court further reversed the summary judgment decision and found that there were issues of fact as to whether the insurer acted in bad faith. Specifically, under Hawaii law, an insurer who defends an insured under a reservation of rights is held to an enhanced standard of good faith, which includes "refrain[ing] from engaging in any action which would demonstrate a greater concern for the insurer's monetary interest than for the insured's financial risk." Finally, the court affirmed the insurer did not control the retained counsel's defense in the action.

Holding: On appeal, the Hawaii Supreme Court affirmed the appellate court's decision in part and vacated it in part. First, although it disagreed with the appellate court's holding that any documents produced before a coverage determination are presumptively not privileged, it held that the trial court needed to determine whether the documents were produced "because of the prospect of litigation" in order to determine if they are privileged. Second, the Supreme Court affirmed the appellate court's decision that there were issues of fact as to whether the insurer had acted in good faith, holding that "[i]nsurance companies must act reasonably even when exercising contractual rights," specifically "the right to so prosecute or provide defense in the action or proceeding, and all appeals therein[.]" Finally, the Supreme Court vacated the appellate court's decision that the insurer did not control the retained counsel's decision-making, noting emails between retained counsel and the insurer that raised disputed facts as to whether counsel was deferring to the insurer on whether to appeal.

Importance to the Title Industry: First, claims counsel must be aware that documents generated from a claims investigation are not privileged without the anticipation of litigation, which likely is unknown until the claims analysis is completed. Second, even when an insurer is exercising its contractual rights to defend title, it must ensure the defenses it raises can support and document the defense of title. In Anastasi, the court's concern was that the insurer could delay a title resolution in an attempt to recoup money from third parties, even though it knew it could not establish title. Finally, with regard to litigation, insurers must be careful in their correspondence with retained counsel so as not to give the impression that the insurer is controlling the litigation.

Michael O'Donnell and Michael Crowley are both of the law firm Riker, Danzig, Scherer, Hyland & Perretti. O'Donnell may be reached at modonnell@riker.com. Crowley may be reached at mcrowley@riker.com.

Do Title Companies Owe Duty of Care to Third Parties in Recording of Legal Instruments?

Citation: *Centurion Properties III, LLC v. Chicago Title Ins. Co., 375 P.3d 651* (Wash. 2016)

Facts: Chicago Title handled a transaction in which the borrower gave a deed of trust to General Electric (GE). Chicago Title also was the trustee under this deed of trust. The deed of trust prohibited the borrower from creating any further liens or encumbrances on the property without permission from GE. Later, Chicago Title recorded four liens on behalf of other lenders. These liens were not authorized by GE, and constituted an event of default under the GE deed of trust. The resulting foreclosure by GE resulted in the borrower filing bankruptcy. The borrower and its principals then sued Chicago Title, alleging that Chicago Title knew the GE deed of trust prohibited subsequent liens and was

therefore negligent in recording the liens.

Holding: Although the litigation was in federal court, the Ninth Circuit certified a question to the Supreme Court of Washington, asking if a title company owed a duty of care to third parties in the recording of instruments. The court answered no, noting that title companies search the public records for their own benefit, not for the benefit of their insured or any other party. A title company has no duty to disclose title defects even to their insured (in this case, the subsequent lenders), let alone a third party like the borrower. The court rejected the argument that title companies owe a general duty of care based on their role as a professional institution fulfilling a public trust, and further rejected the argument that the borrower was a third-party beneficiary to the transactions for the recording and title insurance for the subsequent lenders.

Importance to the Title Industry: This ruling is an important victory for the title industry. It affirms the general rule that any searching or examination of documents performed by a title insurer is done solely for its own benefit in issuing a title insurance policy, and that an insurer's liability is established by the terms of such policy. A contrary ruling could have made title companies responsible for interpreting, and even enforcing, contractual provisions and other documents, greatly expanding both a company's role in the transaction as well as exposure to unintended liability.

Dan Buchanan is senior division underwriter for First American Title Insurance Co. He may be reached at danbuchanan@firstam.com.

California Supreme Court Lets Borrowers Challenge Wrongful Foreclosures

Citation: *Yvanova v. New Century Mortg. Corp.*, 62 Cal.4th 919 (2016)

Facts: In a potentially far-reaching decision, the California Supreme Court held that a borrower has standing to sue for wrongful foreclosure based on allegations that the assignment of the mortgage was void.

In *Yvanova* (and several companion cases), the mortgage loan had been assigned to a securitized trust (consisting of a pool of mortgage loans) through a pooling and servicing agreement. In each case, the borrower challenged the assignments to the investor trust and argued that the foreclosing entity lacked standing to pursue the foreclosure.

The facts in *Yvanova* were fairly typical. The plaintiff obtained a residential mortgage loan from New Century Mortgage Corp. in 2006. In 2007, the deed of trust was assigned by means of a Pooling and Servicing Agreement to a securitized trust. In 2008, the borrower was served with an initial notice of default. In 2012, the borrower was served with second notice of default; the trustee conducted a non-judicial trustee's sale and the property was sold. The plaintiff continued to live in the property through the appeal.

Holding: Prior to *Yvanova,* the California courts mostly held that the borrower lacked standing to challenge the validity of the assignment into a securitized trust. In granting review, the California Supreme Court framed the issue as follows: "In an action for wrongful foreclosure on a deed of trust securing a home loan, does the borrower have standing to challenge an assignment of the note and deed of trust on the basis of defects allegedly rendering the assignment void?"

After repeatedly emphasizing the narrowness of its ruling, the California Supreme Court concluded that the borrower had standing, in post-foreclosure litigation, to challenge the assignment as being void (as opposed to merely voidable). The court reasoned that a borrower could assert a claim for wrongful foreclosure if, in fact, the wrong lender/trustee had foreclosed on the borrower's property. "The borrower owes money not to the world at large but to a particular person or institution, and only the person or institution entitled to payment may enforce the debt by foreclosing on the security."

Importance to the title industry: Prior to *Yvanova,* California courts had routinely rejected borrowers' attempts to challenge the lender's assignment of the deed of trust, and those cases created more certainty for the purchasers and the title insurers in subsequent transactions. The *Yvanova* decision creates more uncertainty and the opportunity for borrowers to file post-foreclosure litigation seeking to challenge the validity of the trustee's sale, potentially creating a cloud on title that could remain for several years of litigation. On the other hand, the *Yvanova* court expressly noted the narrowness of its decision (which reversed a demurrer/motion to dismiss and upheld the technical question of standing), and thus the ultimate effect of *Yvanova* on residential lending, foreclosures and subsequently insured transactions may be minimal.

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Florida Appeals Court Addresses Spousal Rights Involving Reverse Mortgage

Citation: *Edwards v. Reverse Mortg. Solutions, Inc., 2016 Fla. App. LEXIS 3064* (Fla. Dist. Ct. App. 3d Dist. 2016).

Facts: A HECM reverse mortgage was placed on a Florida marital residence in 2006. Prior to the husband's application for the reverse mortgage, title to their homestead, which had been vested in both the husband and wife's name, was properly transferred into just the husband's name. The reverse mortgage transaction closed and funded. The husband alone executed the promissory note, while both spouses executed the reverse mortgage. When the husband died in 2008, the lender accelerated the debt based upon the mortgage provision permitting acceleration upon the death of the borrower. When the widow did not pay off the debt, and despite the fact that the widow continued to reside in the home, the lender instituted a judicial foreclosure. The trial judge ruled in favor of the lender and entered a final judgment of foreclosure. The widow appealed. The appellate court reversed the trial court, remanding the case with directions to enter a final judgment in favor of the widow.

Holding: The appellate court held that even though the widow was not a maker of the promissory note, her joinder in the reverse mortgage (which joinder was required under Florida law in order to have validly encumbered the marital homestead property) relegated her to the status of a co-borrower under the reverse mortgage. As a result of that co-borrower status, the condition precedent upon which the lender had relied to accelerate the debt and institute foreclosure proceedings had not occurred. Acceleration and foreclosure were premature.

Importance to the Title Industry: For the reverse mortgage industry, this decision and others like it (*Smith v. Reverse Mortg. Solutions, Inc.*) call into question the financing technique used here. To maximize the reverse mortgage loan amount available to a borrower, a property owner might be advised to transfer title into the name of the borrower most likely to die, based on actuarial data. Beyond obvious implications for the reverse mortgage industry, this decision more broadly illuminates the potential perils and pitfalls of the routine practice of requiring an out-of-title spouse to "join" in the execution of a mortgage in order to validly encumber a marital property even though the only obligor under the promissory note is the in-title spouse. Review of the terms and conditions of the loan documents is needed whenever there is not a complete identity of interests between the makers of the promissory note and the parties to the mortgage it secures.

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First Mortgage Precludes Junior Lender from Incurring Any Actual Loss

Citation: *Twin Cities Metro-Certified Dev. Co. v. Stewart Title Guaranty Co., 2015 WL 4715064* (Minn. App., 2015)

Facts: In 2007, Prime Security Bank loaned Red Wing Lodging $3.8 million to develop a hotel. The loan was a part of a program run by the Small Business Administration and was secured by a mortgage. In 2008, Twin Cities Metro-Certified Development Company (TCM), as loan servicer for the SBA, lent Red Wing $1.5 million.

This loan was also secured by a mortgage and TCM purchased a title insurance policy from Stewart Title Guaranty. In 2009, a construction contractor filed an action to foreclose on its mechanic's lien. Three other contractors joined the action. Prime Security defended against the action but TCM was not a party. The court determined the liens were valid and had priority over both mortgages. The mechanics' liens judgments totaled $252,927.07. In June 2011, Prime Security foreclosed and bought the property for $2,462,048.54. In December 2011, TCM redeemed the property for $2,391,551.51 and immediately sold it for $3,505,175.62. Over $1.4 million was still owed on TCMs loan and it was required to pay the mechanics' lien judgments. TCM claimed it lost a total of $576,510.01.

As a result, in 2012, it filed an indemnification claim with Stewart for reimbursement of the mechanics' lien judgments, plus interest and attorney fees. Stewart denied the claim. In January 2014, TCM sued Stewart claiming it breached its policy by failing to indemnify TCM for the mechanics' liens. The district court granted partial summary judgment in favor of TCM. It concluded TCM had suffered a covered loss under the title insurance policy as a consequence of the liability resulting from the mechanics liens. The district court entered a judgment in the amount of $360,833.22 for the mechanics'

liens plus interest and attorney fees. Stewart appealed.

Holding: The appellate court interprets insurance contracts *de novo*, and addressed the issue as to whether or not the language in the policy was ambiguous. The language is ambiguous when it is "reasonably subject to more than one interpretation" and unambiguous language is interpreted "in accordance with its plain and ordinary meaning." If there are any ambiguities, they are construed in favor of the insured.

The district court determined that, because the mechanics' liens had priority over the insured mortgages, they were a risk covered by the policy. That being said, title insurance "does not guarantee that the covered conditions does not exist" but indemnifies the insured if it suffers damages due to the condition. As a result, to succeed in its claim, TCM must have incurred an actual loss. The policy limits the actual loss to "the least of (1) the amount of insurance, (2) the amount of debt secured by the mortgage, or (3) the difference in value of the Title as insured and the value of the Title subject to the risk insured against by this policy."

TCM's argument was based upon the definition of actual loss in an *owner's* policy, not a loan policy. In an owner's policy, the actual loss of the insured is simply the difference in value of the property as insured and its value without the defect in title. This formula doesn't apply in this situation because TCM is a mortgagee insured under a lender's title insurance policy, not an owner. A mortgagee suffers actual loss only to the extent to which the insured debt is not repaid because the value of the secured property is diminished by outstanding liens or title defects. Therefore, TCM needed to show that the loss of value actually reduced the equity that TCM was able to recover from the property in satisfaction of its mortgage.

TCM was the lender in a second position, and Prime Security's mortgage exhausted all of the equity in the property. Therefore, in order for a junior mortgage to sustain an actual loss under a lender's policy, the junior mortgagee must retain equity in the property notwithstanding any defects in title covered by the policy. If there is no more equity in the property because of a senior mortgagee or senior lienholder, whose interest is excluded on the policy, the junior mortgagee does not suffer an actual loss when a covered title defect further reduces the property's value.

The appellate court ruled as a matter of first impression, the first mortgage precluded the lender from incurring any actual loss due to liens. The appellate court reversed and remanded because the district court misconstrued the definition of actual loss under the policy.

Importance to the Title Industry: The Minnesota Appellate Court provided a skillful analysis of the differences between an owner's policy and a lender's policy and the definition of actual loss. This is a good case for the industry as it clarifies the position held by other courts that if a lender chooses to take a risk and be in a junior position, that is their risk and if there is no equity after payment to the first lender/lienholder, there is not an actual loss under the policy.

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Utah Court Addresses Insurer Liability to Non-insured Third-party Beneficiary

Citation: *Orlando Millenia, LC v. United Title Servs. of Utah, Inc., 355 P. 3d 965* (Utah 2015)

Facts: Orlando Millenia LC financed a $1 million down-payment for property purchased by IDR Investments LLC from Paydirt LP. Paydirt had previously purchased the property at auction from SITLA. United Title Services of Utah Inc. acted as the title and escrow agent for the transaction. United Title issued a Stewart Title Guaranty Company title commitment to IDR, with Stewart's authorization, but also issued an unauthorized First American Title Insurance Company title commitment to IDR.

Orlando drafted escrow instructions which incorporated the terms of the real estate closing contract and conditioned disbursement of the $1 million down payment upon Orlando and IDR's receipt of certain documents. The escrow instructions were signed by IDR and Orlando. Orlando did not attend the closing, but rather gave IDR verbal instructions to protect Orlando's interest at closing. At closing, IDR insisted that it must receive a warranty deed as required by the real estate closing contract. IDR was confused by the length and complexity of the closing documents, but signed upon assurance from United Title that it would receive its warranty deed to the property.

United Title released the $1 million escrowed funds to Paydirt, without permission from Orlando even though IDR had not received its warranty deed. Orlando subsequently learned that Paydirt did not own the property

and would not get a deed until SITLA was paid in full for the property. Demand letters from Orlando to United Title for the return of the $1 million and resolution of the title to the property went unresolved. IDR declared bankruptcy. Orlando filed suit, asserting (1) breach of fiduciary duty against United Title for releasing escrowed funds without fulfilling the terms of the escrow agreement, and (2) vicarious liability against Stewart and First American pursuant to a vaguely worded Utah statute, Utah Code section 31A-23a-407 (2003), which makes a title insurer liable "to others" for escrow funds where a title commitment has been issued. Both title insurers moved for summary judgment arguing that they were not vicariously liable for United Title's actions as an escrow agent under §407. United Title also moved for summary judgment arguing that §407 did, indeed, impute liability to Stewart and First America. The trial court, without a written opinion, found in favor of Stewart and First American and against Orlando. In painstaking detail and with obvious concern for the lack of clarity, uncertainty, and breadth of coverage, it attributed to § 407, the Utah Supreme Court reversed.

Holding: The court held: (1) Orlando asserted a viable claim against United Title arising from its alleged breach of fiduciary duty and genuine issues of material fact precluded entry of summary judgment against it; and (2) Orlando asserted a claim for vicarious liability against Stewart and First American under Utah Code section 31A-23a-407 (2003). In so holding, the court noted that Stewart and First American's statutory liability was fully contingent upon Orlando's success with its fiduciary duty claim. The court also, with great deference to Utah's legislative branch, urged amendment of the statute.

Relevance to the Title Industry: Depending on the facts of each individual case, this action could have impacted and significantly increased a title insurer's liability in Utah to non-insured third-party beneficiaries of an escrow agreement, where the third party uses the escrow services of the insurer's agent and the agent improperly disburses escrow funds. However, as a result of the amendment of §407, liability for insurers in Utah is now more clearly defined. It is unlikely that the broad liability imposed by the earlier version of the statute can be incurred. For instance, under amended §407, First American most likely cannot be found liable under the facts of this case. Furthermore, under the amended statute a title insurer may have contractual recourse in the event the agent breaches escrow arrangements. Lastly, monetary damages are limited under amended §407 to the amount of money disbursed, plus 10 percent, up to the amount of title insurance. Title insurers should be cautioned that they may still be liable to "third parties" under amended $407.

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Tennessee Supreme Court Ruling in MERS Case Muddles Marketable, Insurable Title After Tax Deed Sale

Citation: *Mortgage Electronic Registration Systems, Inc. v. Carlton J. Ditto, Case No. E2012-02292-SC-R11-CV* (Tenn. December 11, 2015).

Facts: Hamilton County conducted a tax sale as to property that was subject to a deed of trust (DOT). The DOT identified the original lender and Mortgage Electronic Registration Systems Inc. (MERS) as nominee for the original lender. Although the county gave notice to the original lender, it did not attempt to give notice to MERS. The property went to tax sale, and Carlton J. Ditto purchased it for $10,000. A year and a half later, MERS filed a petition to set aside the sale as *void ab initio* due to the failure to give MERS notice. MERS claimed, *inter alia*, that it was entitled to notice because it was named in the DOT and had a constitutionally protected right in the property. Ditto argued MERS lacked standing to challenge the sale because the DOT did not grant MERS a legal protected interest in the property and thus MERS was not entitled to notice of the tax sale. The county joined in Ditto's argument. The trial court granted Ditto's motion for judgment on the pleadings. The Tennessee appellate court affirmed, ruling that MERS lacked standing to file an action to set aside a tax sale because it was never granted an independent interest in the property. MERS appealed to the Tennessee Supreme Court.

Holding: The Tennessee Supreme Court affirmed the trial court's grant of judgment on the pleadings to Ditto. In a detailed 35-page opinion, the Tennessee Supreme Court outlined the role of MERS in the mortgage industry and its system of registering and tracking mortgages designed to address the problems arising out of mortgage securitization. It discussed the United State Supreme Court's prior ruling in *Mennonite*

noting that a mortgage lender has a legally protected property interest and is entitled to notice of a tax sale. It also reviewed a number of varying opinions on the meaning of MERS' involvement as a beneficiary "solely as nominee" for the lender.

Turning to the language of the DOT itself, the Tennessee Supreme Court confessed its perplexity at the "mishmash of descriptive terms and qualifiers in the DOT regarding MERS." In the end, the Tennessee Supreme Court concluded that, while it did not question MERS' authority as agent for the lender or its successors, MERS was not a true "beneficiary" of the DOT. Not even the notice provision of the DOT itself, the court observed, called for notice to MERS and the rights and obligations outlined in the DOT belong exclusively to the lender and not to MERS. The Tennessee Supreme Court thus held that, despite the language of the DOT designating MERS as "beneficiary solely as nominee for the lender and its assigns" and stating that MERS had "legal title" to the property, the DOT did not grant MERS any independent, protected property rights. As a result, the court determined the sale of the property without notice to MERS did not violate its due process rights.

Importance to the Title Industry: By ruling that MERS had no constitutionally protected property right and was not due notice of a pending tax sale, the Tennessee Supreme Court's opinion may result in many properties being sold without any effective notice to the current lenders. Given the prevalence of the use of MERS as a lender's nominee, this opinion raises unsettling questions about whether lenders are due any real or effective notice of a tax sale. By raising such questions, the opinion may open the door to other litigants who may seek to effect notice of tax sales and perhaps foreclosures without any notice to MERS and thus without notice to the current owners of the security instruments encumbering real property. This will almost certainly lead to an increase in disputes and litigation as to the marketability and insurability of title in Tennessee.

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Corporate Seal on Title Policy Extends Statute of Limitations

Citation: *Lyons v. Fidelity National Title Insurance Company, Case No. 2013–002137,* (S. C. App., December 2, 2015).

Facts: Security Title issued a fee policy to Lyons in 2005. In 2006, Lyons learned the federal government claimed an easement over their property. The easement was not excepted in policy Schedule B, but Lyons did not submit a claim until 2011. Security Title rejected the claim. In 2012, Lyons filed an action for breach of contract and bad faith failure to pay. Security defended on the merits, as well as pleading South Carolina's three-year statute of limitations for contract actions. The trial court determined the policy was a "sealed instrument" subject to the 20-year statute of limitations applicable to "an action upon a sealed instrument." The basis for this determination was the pro forma Security Title corporate seal on the face of the policy. Security Title appealed.

Holding: The Court of Appeals of South Carolina upheld the trial court's determination. Security Title had cited South Carolina case law explaining that the seal of corporation is not, in itself, conclusive of intent to create a "sealed instrument." The court brushed this aside. Referring to "the unique circumstances of this case," the court observed "there is no statutory requirement that a title insurance company place its corporate seal … on a policy." Due to "the rules of contract construction requiring that insurance policies be construed against the drafter and in favor of coverage … we find the presence of the seal on the face of the policy, next to the president's signature, evidences an intent to create a sealed instrument." Just like that, the court extended sevenfold the statute of limitations on any title insurance policy bearing a corporate seal. The court went on to rationalize this result with the observation that "a twenty-year statute of limitations allows policyholders to carefully monitor situations as they unfold, ultimately preventing the bringing of unnecessary claims or litigation."

Importance to the Title Industry: This decision dramatically increases exposure in South Carolina for title insurers that include their corporate seal on the face of their policies. Most states adhere to the basic rule that the mere affixation of a corporate seal to a contract, by itself, is insufficient to create a "sealed instrument." Unless this holding is overturned by the South Carolina Supreme Court, however, the pro-consumer policy rationale may begin to influence other courts around the country.

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Survey: TRID Title Insurance Fee Disclosure Confuses Consumers

Online Survey of 2,000 Consumers Reinforces Need to Correct Inaccurate Disclosure of Title Premiums

Since rolling out the TILA-RESPA Integrated Disclosures (TRID) rule, the Consumer Financial Protection Bureau has said the goal of the new mortgage disclosures was to make the process of getting a mortgage is easier and to help consumers understand the key features, costs and risks of a loan.

When the CFPB proposed its amendments to the rule in July, bureau Director Richard Cordray reinforced this message saying the "rules are designed to make sure consumers have the information they need, in a form they can easily understand and use, before making the decision."

Unfortunately, results of an online consumer survey conducted by ALTA over the summer reveal the CFPB's mortgage disclosures are not meeting this objective and working as intended. In July, ALTA partnered with Survata, a leading research firm that works with Fortune 500 companies on obtaining consumer opinions, to collect data on consumer's experience around shopping for title insurance and the TRID disclosures. Survata. Those surveyed included 2,000 current (93 percent) and prospective homeowners (7 percent)—those who planned to purchase a home in the next year. Of the current homeowners who were surveyed, more than 61 percent were owners for more than a decade, while 18 percent were in their home between five and 10 years. Newer homeowners (less than five years) made up 20 percent of those surveyed.

The survey posed 14 questions about preferences for learning about title insurance. During the survey, consumers were shown compliant Closing Disclosures, which displayed title insurance premiums following the CFPB rule. Respondents were then informed of the actual cost of title insurance. The survey measured their reactions.

The data showed that a plurality of the people surveyed find the rule confusing and deceptive. After showing the CFPB's disclosures and presented with the true cost of title insurance, the most popular response from consumers at 31 percent was "I'm confused." While this confusion is disconcerting, it is not the most troubling finding from the survey. The most disconcerting data point

ALTA Sends Two Letters to CFPB

ALTA sent two letters to the Consumer Financial Protection Bureau ahead of the Oct. 18 deadline to submit comments on the bureau's proposed amendments to the TILA-RESPA Integrated Disclosures rule. The first letter shared results of its consumer survey, while the second letter encouraged the CFPB to prevent lenders from shifting liability for disclosure mistakes and to use the rulemaking period to provide more formal guidance about how to comply with the rule.

For more information, go to *www.alta.org/cfpb*.

is that 10 percent of consumers felt that they were being taken advantage of by not being told the true cost of title insurance on the disclosure.

"Frankly, this is 10 percent too many," said Michelle Korsmo, ALTA's chief executive officer. "The purpose of the CFPB is to protect consumers by ensuring markets are fair, transparent and competitive. However, the bureau's decision to require the inaccurate disclosure of title premiums is having the opposite effect and is not providing consumers understandable information to help them make responsible decisions about financial transactions."

Meanwhile, roughly 27 percent of respondents felt that the CFPB disclosure was positive because it was good to know the marginal cost of buying an owner's policy.

ALTA has informed the CFPB that amending the Official Interpretations for §1026.37(f)(2), §1026.37(g)(4) and §1026.38(g)(4) is the best way to correct the rule and allow title insurance fees to be disclosed the same way as every other fee.

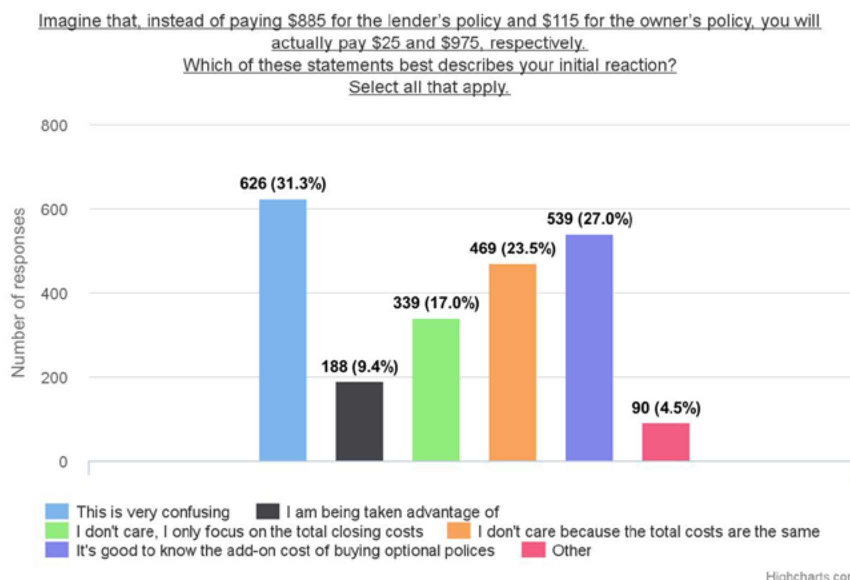
The survey also asked consumers to rank the factors they care about when trying to understand their transaction. Topping the results was getting a detailed breakdown of all the costs for a service, followed by the ability to easily compare estimates to final figures and comparing the disclosure to the actual costs. At the bottom of the rankings is providing marginal cost of optional products and seeing bottom-line amounts like cash-to-close.

"These findings show that consumers would find more value in the mortgage disclosures if they showed accurate costs for title insurance instead of the incremental costs," Korsmo said.

Additionally, survey results reinforced the continued need to educate consumers about the benefits of title insurance earlier in the transaction. More than half of those surveyed indicated they either received information about title insurance at the closing table or didn't know about the product.

"ALTA members must remain committed to educating consumers about how title insurance provides peace of mind by protecting their property rights," Korsmo said. "An equal commitment from the Bureau is needed to ensure that confusion over the price of title insurance does not undercut these efforts."

Chart from Consumer Survey



Digital TitleNews Extra: TitleTopics: Consumer Outreach and Education Yes It Does Work

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Deals, Partnerships Continue in Title Space

TRG Expands in Idaho; Two Florida Firms Join Forces; National Title Makes Move in Minnesota; First American Acquires RedVision

Companies continue to consolidate or forge new partnerships in order to grow market share and offer additional services and products.

In September, Title Resource Group LLC announced the acquisition of TitleOne Corp., which is headquartered in Boise, Idaho. TitleOne has approximately 215 employees and 13 offices that provide title and settlement services to homebuyers in Idaho. The company will continue to operate under its current name. Former co-owner Mark Tidd will remain with TitleOne as chief executive officer, reporting to Neil Gulley, senior vice president of the western region for TRG. Financial terms of the agreement were not disclosed.

TitleOne, which serves 14 Idaho counties, was founded in 2000, by a small group of entrepreneurs. Since 2012, the company has been named one of the top 10 "Best Places to Work in Idaho" in the large employer category (100 and more employees), according to POPULUS.

"The acquisition of TitleOne is part of TRG's strategic growth plan," said Donald Casey, president and chief executive officer of TRG. "Its branch network in Idaho expands our national footprint and adds a significant physical presence for us in the region. We are excited to be adding one of the most successful and fastest growing title companies in the state of Idaho to the TRG family of companies."

Meanwhile, Florida Agency Network (FAN) and SETCO Services formed a strategic relationship to expand their footprint in key Florida markets. As opposed to other FAN locations established through organic growth or formalized partnerships, the announcement represents FAN's first non-equity relationship where the entities will support one another and avail themselves of each other's locations, client relationships, marketing and other ancillary services.

"We are incredibly excited to announce the formation of this strategic partnership with SETCO Services, which is a first of this kind for us. It represents a new approach to true partnership amongst independent agents in Florida," said Aaron Davis, CEO of Florida Agency Network. "We are able to significantly expand our territory through additional brick-and-mortar locations, while keeping that 'boots on the ground' local knowledge to better serve our client base."

SETCO Service will utilize the back-office solutions provided by FAN. Centralizing the non-core title services will allow SETCO Services to better focus on providing exceptional service for every real estate professional while maintaining top-notch security and protection of NPI via FAN's compliance controls, the companies said in a press release.

"The relationship with Florida Agency Network will allow SETCO to offer more diverse yet streamlined services, which will only further improve the customer service to our clientele," said George Brannon Jr., chief operating officer of SETCO Services. "The leadership and goals of our companies are like-minded and this opportunity will provide all organizations partnered with Florida Agency Network to grow more efficiently and effectively in the markets they choose to lead."

FAN's tight security controls consist of SSAE 16 SOC 1 and SOC 2, third-party certification to ALTA Best Practices and support through its information technology affiliate, Premier Data Services (PDS).

Up in Minnesota, North American Title Co. (NATC) acquired Lakeville-based Realstar Title, which operates in five locations. The

acquisition expands NATC's footprint to 13 branch offices throughout the state.

"Over the past 20 years, Tom Christensen has put together a team of experienced and knowledgeable professionals that has justly earned a stellar reputation throughout the state," said Tom Fischer, president of North American Title Group. "Their values, hard work and customer service focus are an exemplary model for the kind of agency we are looking to partner with as we grow our footprint across the U.S."

A Minnesota licensed real estate attorney and a veteran of the title insurance industry, Christensen launched Realstar Title in 1994 in Lakeville.

Alex A. Grundhoffer, NATC senior vice president and Minnesota division manager, said the acquisition of Realstar stretches NATC's coverage area from "the Iowa border to an hour north of the Twin Cities."

"We recognize how well Realstar's footprint and staff complement and enhance what we are trying to achieve as a company," he added. "In turn, we can provide them with the all-important infrastructure and investment in industry best practices and compliance that has become so challenging for a smaller organization."

In another move, First American Financial Corp. acquired RedVision Systems Inc., a national provider of title and real property research.

The acquisition will allow First American's Data Trace group to leverage RedVision data to build additional title plants. RedVision will become part of First American's Data and Mortgage Solutions division. It will operate as a business unit under its brand and its management team. Brian Twibell, RedVision's CEO, will continue to lead the business.

"RedVision's nationwide title production platform, coupled with First American's title and property data, and billions of recorded documents, will offer our customers unmatched quality, coverage and operational flexibility," said George Livermore, executive vice president of First American's data and mortgage solutions division.

New Jersey-based RedVision is an ALTA Elite Provider. ■

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FTC Seeks Comments on Safeguards Rule

Information Security Protocols in ALTA's Best Practices Based On the Rule

The Federal Trade Commission (FTC) is accepting public comments on whether to update its 2003 Standards for Safeguarding Customer Information (Safeguards Rule) as part of its review of all FTC rules.

The rule, which was created by the Gramm-Leach-Bliley Act, requires financial companies (including title insurance and settlement service companies) to protect customer information.

The current Safeguards Rule says:

You shall develop, implement, and maintain a comprehensive information security program that is written in one or more readily accessible parts and contains administrative, technical, and physical safeguards that are appropriate to your size and complexity, the nature and scope of your activities, and the sensitivity of any customer information at issue. Such safeguards shall include the elements set forth in § 314.4 and shall be reasonably designed to achieve the objectives of this part, as set forth in paragraph (b) of this section. 16 CFR 314.3

This rule is the basis for most of the information security protocols in the ALTA's Best Practices.

In addition to general issues for comment, the FTC has published a list of five specific issues on which they request comment:

1. Should the elements of an information security program include a response plan in the event of a breach that affects the security, integrity, or confidentiality of customer information? Why or why not? If so, what should such a plan contain?
2. Should the rule be modified to include more specific and prescriptive requirements for information security plans? Why or why not? If so, what requirements should be included and what sources should they be drawn from?
3. Should the rule be modified to reference or incorporate any other information security standards or frameworks, such as the National Institute of Standards and Technology's Cybersecurity Framework or the Payment Card Industry Data Security Standards? If so, which standards should be incorporated or referenced and how should they by referenced or incorporated by the rule?
4. For the purpose of clarity, should the rule be modified to include its own definitions of terms, such as "financial institution," rather than incorporating the definitions found in the Privacy Rule?
5. The current Safeguards Rule incorporates the Privacy Rule's definition of "financial institutions" as entities that are significantly engaged in financial activities, including activities found to be closely related to banking by regulation or order in effect at the time of enactment of the GLB Act. Should the Safeguards Rule's definition of "financial institution" be modified to also include entities that are significantly engaged in activities that the Federal Reserve Board has found to be incidental to financial activities? Should it also include activities that have been found to be closely related to banking or incidental to financial activities by regulation or order in effect after the enactment of the GLB Act? If so, should all such activities be included in the modified definition?

Comments are due by Nov. 7. Go to *www.ftc.gov* for information on how to submit comments.

Questions also may be emailed to Steve Gottheim, ALTA's senior counsel, at *steve@alta.org*. ■

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Commercial, Multifamily Originations Remain Strong in Q2

Volume Holds Steady Compared to 2016

Low interest rates continued to help keep commercial and multifamily origination on pace with last year, according to data from the Mortgage Bankers Association.

During the second quarter of 2016, commercial and multifamily mortgage loan originations were 1 percent higher than during the same period last year and 17 percent higher than the first quarter of 2016.

A rise in originations for office and industrial led the overall increase in commercial/multifamily lending volumes when compared to the second quarter of 2015. The second quarter saw an 11 percent year-over-year increase in the dollar volume of loans for office properties, a 9 percent increase for industrial properties, a 1 percent decrease for multifamily properties, a 9 percent decrease for retail properties, an 11 percent decrease in hotel property loans, and a 64 percent decrease in health care property loans.

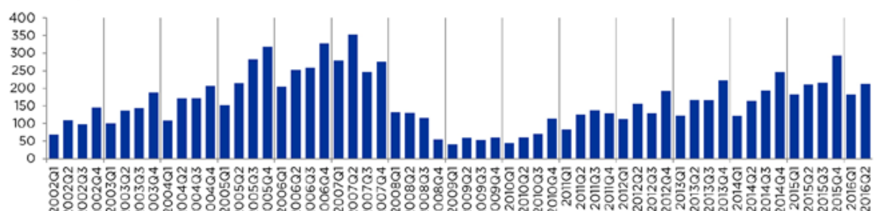
Among investor types, the dollar volume of loans originated for commercial bank portfolio loans increased by 33 percent year-over-year. There was a 15 percent year-over-year increase for life insurance company loans, a 3 percent decrease in government sponsored enterprises loans, and a 40 percent decrease in the dollar volume of commercial mortgage backed securities (CMBS) loans.

Second quarter 2016 originations for hotel properties increased 26 percent compared to the first quarter 2016. There was an 18 percent increase in originations for multifamily properties, a 14 percent increase for retail properties, a 7 percent increase for office properties, a 2 percent increase for industrial properties, and a 25 percent decrease for health care properties from the first quarter 2016. ■

Mid-year 2016 Commercial/ Multifamily Servicer Rankings

	Company	Amount ($ millions)
1.	Wells Fargo Bank	$502,157
2.	PNC Real Estate/ Midland Loan Services	$499,058
3.	Berkadia Commercial Mortgage LLC	$220,580
4.	KeyBank National Association	$195,417
5.	CBRE Loan Services	$108,304
6.	Prudential Asset Resources	$81,861
7.	Capital One Financial Corp.	$58,254
8.	Walker & Dunlop	$57,327
9.	HFF LP	$54,858
10.	NorthMarq Capital	$47,746

Source: MBA



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CFPB Unveils TRID Resources Guide

The Consumer Financial Protection Bureau (CFPB) has compiled several resources to help title and settlement agents navigate changes the TILA-RESPA Integrated Disclosures (TRID) rule brought to the closing process.

"Settlement professionals are integral to real estate transactions," according to the CFPB. "They gather essential data, coordinate transfer of ownership and orchestrate many of the events leading to the consummation of a loan. This guide was designed to help settlement professionals navigate through the changes that are a part of the Know Before You Owe mortgage initiative."

What the guide includes:

- ***What has and hasn't changed:*** *Learn about settlement agent responsibilities, creditor responsibilities, consumer privacy and electronic delivery.*
- ***Once you are selected as the settlement agent for the transaction:*** *The bureau outlines three areas that title and settlement professionals may want to focus on as they strive for smooth and on-time closings.*

There also is a compilation of additional resources, including implementation and guidance, e-regulations, an interactive guide to the forms and a home loan toolkit. For more information, go to *www.alta.org/cfpb*.

Ellie Mae Integrates With Qualia

Ellie Mae announced its Encompass mortgage management solution has been integrated with Qualia's cloud-based settlement software. The integration allows rate and fee quoting, title and settlement ordering on Closing Disclosure forms and document sharing directly from Encompass. According to the companies, this will give Encompass users a more streamlined workflow and the ability to import rates and fees and revised title-related fees directly into the Closing Disclosure.

Colorado Bans MSAs in Title Industry

Less than a year after the Consumer Financial Protection Bureau (CFPB) released its bulletin on Marketing Services Agreements (MSAs), new regulation prohibiting these arrangements in Colorado went into effect Aug. 15.

The ban on MSAs is part of Regulation 8-1-3, which includes a number of new title insurance standards of conduct. Under what the Colorado Department of Regulatory Agencies Division of Insurance calls a partial list, the division outlines acts and practices considered to be illegal inducements, including MSAs. Initial regulation language prohibited MSAs designed to disguise the payment of referral fees. That language was dropped from the final regulation. MSAs formed before Aug. 15 can continue as long as they are compliant with the previous regulation.

General marketing activity outside of MSAs is allowed under the new regulation subject to defined standards, fair-market value being one example. The regulation only bans MSAs involving title companies.

While the Land Title Association of Colorado (LTAC) does not have a position on MSAs, it did form a Task Force to monitor the Reg 8-1-3 Working Group and the progression of the drafting of the new regulation. The Working Group was formed by the Division of Insurance. Participants included members of the title industry (including agents and underwriters), affiliated industry partners (brokers, lenders, real estate attorneys) and consumer representation. The LTAC's Task Force also included agents and underwriters.

At the federal level, Section 8 of the Real Estate Settlement Procedures Act (RESPA) prohibits anyone from giving or accepting a fee, kickback or anything of value in exchange for referrals of settlement service business involving a federally related mortgage loan.

Old Republic Launches Centralized Funding Service

Old Republic Title is offering a centralized funding service called OR EscrowPro, which manages escrow transactions through a single, collaborative and secure website.

Old Republic said the service benefits title agents, lenders, and buyers and sellers of real property by enhancing control, security and efficiency. No new technology or upfront costs are required to participate, Old Republic said in a release.

Old Republic said OR EscrowPro mitigates escrow-related risks for parties involved in real estate settlement transactions by keeping escrow funds protected in an environment with specific security and controls. In addition, the system, assures confidence in knowing that funds and loan proceeds are wired and deposited directly from the lender into an escrow account owned and managed by Old Republic Title.

ePN Partners With Landtech Data to Improve Recording Efficiency

eRecording Partners Network (ePN) and Landtech Data Corporation have integrated to improve the recording process for closing agents. This integration will allow settlement providers to electronically record documents directly from the Landtech system, which promotes a faster, more efficient recording process.

Missouri Implements New Notary Legislation

Legislation in Missouri (SBI No. 932) requires county clerks to keep a registry of each notary public awarded a commission. The county clerk also must provide by certified email to the secretary of state the notary's bond, signature and oath within 30 days. A notarized signature or record is satisfied as notarized if the signature or record is accompanied by the e-signature of the notary along with all other information required. Every notary must keep an official notarial seal that is their exclusive property. The seal may not be used by any other person or surrendered to an employer upon termination of employment.

ShortTrack Integrates Mobile Data Security Platform With RamQuest

ShortTrack announced that its mobile data security platform has integrated with RamQuest's Closing Market network to aid the protection of non-public personal information (NPI). ShortTrack allows title professionals to securely share documents and redirect any emails containing NPI through its notification system. By integrating with RamQuest, ShortTrack users will not have to re-upload their customers' documents or use email encryption to deliver documents.

CATIC Partners With Credit Union League of Connecticut

CATIC, which has eight offices throughout New England and issues its policies through a network of more than 2,200 attorney agents, formed a partnership with the Credit Union League of Connecticut to provide services to Connecticut's credit unions and their policy-issuing attorneys.

"We are very excited about this new relationship which will allow us to partner with our attorney agents and lenders to comply with the many requirements imposed by Dodd Frank and the Consumer Financial Protection Bureau," said Richard Hogan, vice president and chief compliance officer at CATIC.

SoftPro Releases Patriot Act Compliance Product

SoftPro released a new Patriot Search product that helps users to comply with the USA Patriot Act. Available through its business exchange platform, SoftPro's Patriot Search provides the ability to compare individuals and/or companies from their SoftPro orders to the Specially Designated Nationals (SDN) List maintained by the U.S. Department of Treasury. The USA Patriot Act prohibits financial transactions with persons and organizations listed on the SDN List, and SoftPro's Patriot Search will ensure that parties are not prohibited persons or entities before transacting any business with them.

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Fidelity National Title Group

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On Reflection

I joined the ALTA Board of Governors in 2008. That seems like forever ago, in some sense, but the time also seems to have passed very quickly. It's an odd juxtaposition of the perception of time. Earlier this month, ALTA ONE—ALTA's newly minted experience replacing the Annual Convention—marked the conclusion of my term as ALTA president. Looking back, think of all the things that have occurred during the past eight years:

- The aftermath of the 2007 GAO Report
- The Great Recession of 2008
- The passage of Dodd-Frank in 2010
- "Foreclosure Gate," or so-called "Robo signing"
- The failure and bail-out of Fannie Mae and Freddie Mac
- The birth of the Consumer Financial Protection Bureau (CFPB) in 2011
- The OCC enforcement actions and a lawsuit brought by 49 attorneys general, resulting in increased supervision of third party service providers by mortgage companies
- A myriad of CFPB market conduct enforcement actions against a cross section of mortgage industry participants
- CFPB Bulletin 2012-03, requiring mortgage companies to oversee third party service providers to ensure compliance with federal consumer financial laws
- The development and implementation of ALTA's Best Practices
- The implementation of TRID in 2015

My reaction along the way has been a bit defensive in nature. I love our industry and have frequently felt that many of the governmental and lender responses could be put in the category of overreaction. The pendulum swung too far.

My visceral reactions are borne out of pride for our industry. We are good people! Our products and services are valuable to the people we serve. The work that we do is wholesome and benefits society. It's good and honest work.

Although it's cathartic for us to focus on the overreaction of government, legislators and regulators are merely responding to legitimate concerns of constituents. Our industry does itself a disservice when it misses this point.

Think about what happens in a typical purchase or refinance transaction. Our industry is entrusted with an enormous amount of non-public personal information (NPI) of everyday people. We are entrusted with their life savings, which pass through our escrow accounts. How would any of us feel if our identities were stolen? How would we feel if our life savings disappeared? How would we feel if we were cheated through inflated prices or overcharges?

Our industry does a much better job today focusing on three things—three things that sum up, in my view, the lessons from the last several years:

- Protect NPI of the people we serve
- Protect our escrow trust accounts
- Treat consumers fairly

Thank you for the honor of serving as ALTA president this past year. I am enormously proud of our industry, made up of good people, making an honest living, providing valuable products and services to a public that depends on us to do the right thing.

— John Hollenbeck NTP, ALTA president

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ALTA Unveils New Conference

Looking around at the businesses of today and the changes they're making to succeed tomorrow, we know this is our opportunity to invest in lasting improvements. Telephones, taxis and hotels have turned into Skype, Uber and AirBnB. It's time to approach the industry in a bold and innovative way.

"Springboard is our vision for all that we can do together—as your association, as a company, as a community of experts and as the protectors of property rights."

– Michelle Korsmo,
ALTA's chief executive officer