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SPECIAL EDITION:

Inside this issue is an insert highlighting
NEW LEGISLATION

Mark-Ups – The Real Deal

■ James C. Russick, Florida State Counsel

In 2001, HUD published a policy statement wherein they declared that “a charge by a person for which no or nominal services are performed or for which duplicative fees are charged is an unearned fee and violates this section.” The “section” referred to was Section 8 of RESPA. That provision states, “No person shall give and no person shall accept any portion, split, or percentage of any charge made or received for the rendering of a real estate settlement service in connection with a transaction involving a federally related mortgage loan other than for services actually performed.”

HUD’s focus with the additional language was “mark-ups.” Whenever a closing agent charges more than actual cost for a third party service, that agent runs afoul of HUD’s policy statement. For instance, if an agent charges \$25 for express mail fees that cost the agent \$12.50, HUD asserts that this violates Section 8 of RESPA unless the agent added value to the service.

Since the 2001 HUD Policy Statement, this issue has been the focus of litigation with mixed results. Some courts have held that Section 8 prohibits the splitting of a fee with a third party and does not prohibit mark-ups. Further, some of these courts held that HUD exceeded its legislative delegation of authority in publishing the 2001 Policy Statement. See Echevarria v. Chicago Title and Trust, 256 F. 3d 623, Boulware v. Crossland Mortgage Corp., 291 F. 3d 261, and Haug v. Bank of America, 317 F. 3d 832.

These cases would lead one to a false sense of security. The case of Kruse v. Wells Fargo Home Mortgage Corporation, 383 F.3d 49 supported HUD’s position. This means there is a split of authority between several Federal District Courts.

As if this dispute is not enough, HUD recently announced its position that mark-ups also violate Section 4 of RESPA. Section 4 is the provision that requires the use of the HUD-1 closing statement with itemizations of each charge. It must speak the truth of all disbursements, and HUD is taking the position that a mark-up on a HUD-1 is an inaccurate articulation of the flow of settlement funds. As with Section 8, there are both civil and criminal sanctions for violating Section 4.

HUD has made the public statement that its focus on the next round of RESPA reform will be “surprise fees” at the closing table. Their continued insistence that mark-ups violate RESPA is consistent with this broader concern and is the basis for Old Republic Title’s position that agents are not authorized to mark-up third party services or otherwise violate the Florida Promulgated Rate Rule. Should any agent have a question regarding these issues, please do not hesitate to contact the Underwriting Department.



In The Title Center



Latest Scam

■ James C. Russick, Florida State Counsel

Fraud continues to be very prevalent in the real estate marketplace and presents a constant challenge for the title insurance industry. One traditional method involves forged deeds. Their existence presents a strong case for both the need and the value of title insurance coverage.

Old Republic Title has recently witnessed a new approach to the traditional forged deed scam. Thieves identify vacant properties that are owned by foreigners who are behind on their ad valorem taxes. The criminals forge deeds into themselves using fake foreign notaries to make it appear that the transaction occurred legitimately. The property is flipped to an innocent third party soon thereafter.

Our **RED HOT** real estate market in Florida has created an environment that is very conducive to this fraud. The red flags available to guide an agent are subtle. Look for vacant property that has been

conveyed by a foreign owner within the preceding year. By the time the agent is asked to insure, the taxes have typically been brought current and there is no reviewable record of their prior delinquency.

It is difficult to protect our prospective insureds in these instances because of the practical hurdles presented. An agent cannot easily verify the legitimacy of the prior deed because the prior foreign owner cannot be easily contacted. Where that can be accomplished and the agent can acquire a “corrective” deed through their own efforts, Old Republic Title would be comfortable to insure. Equally, if the deed from the foreign seller has a “Prepared By” stamp of a title insurance industry professional and it can be verified that they acquired the deed through their own channels, Old Republic Title will insure. Where verification cannot be accomplished, the company will decline to insure.



We have seen several of these titles where the warranty deed out of the grantee of the foreigner’s deed has been insured. The presence of the title insurance policy should not be a substitute for vigilance and common sense, particularly where you are now asked to issue a policy for an amount significantly greater than the prior policy. You are encouraged to contact the Underwriting Department whenever you encounter this fact pattern.

Ask Your Underwriter

■ Linda M. Hernandez, Florida State Underwriter

Question: Our office is handling a transaction involving a foreign seller who claims he is not subject to FIRPTA withholding because he has a Social Security number. Is he correct?

Answer: No; the 10% withholding applies to a foreign seller regardless of the fact that he has a valid Social Security number. The important issue is that you have a foreign seller disposing of a U. S. real property interest. This event triggers FIRPTA withholding unless there is an exemption available to the seller.

The FIRPTA withholding is an estimated tax payment and is collected in an effort to encourage the foreign seller to file a U. S. income tax return and obtain a refund—or pay his share of the tax liability on the sale!

Also, there are **NO** tax treaties with any country that avoid the 10% withholding requirement; therefore, don’t let them deceive you into thinking they have a valid exemption.



COMMENTS:

We invite your feedback and welcome your suggestions regarding “In The Title Corner” and the publication of future articles. Address correspondence to:

In The Title Corner

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100 S. Ashley Drive, Suite 700
Tampa, FL 33602
800-342-5957
Fax: 813-223-3401

Naked Satisfactions

■ By Donna Roberts, Florida Claims Administrator

Don't let the title of this article fool you. The title industry is not becoming fashion conscious and we're not directing our agents to dress up their document, either. As you know, our industry is constantly riddled with new twists to old scams. The **forged or naked** satisfaction continues to be a headliner on the industry's fashion runway.

Our purpose is to draw your attention to the chain of title: (1) a

Satisfaction of Mortgage recorded within a short period of time (a year or less) from the date of your transaction; and (2) the property remains free and clear to date. If the chain of title does not show a new mortgage in favor of a private or institutional lender and a Satisfaction was filed within the last year, further scrutiny of this design is required. This style is far too often the pattern used by a forger.

Recognizing the pattern and asking your seller, borrower or their broker how they were able to pay off their mortgage without accessorizing it with a new loan is not enough. Additional inquiries to determine from the lender that it was, in fact, paid in full, are mandatory. If you are unable to confirm with the lender who executed the Satisfaction that it is a valid instrument, contact our Underwriting or Claims Department.

UPCOMING SEMINARS 2005 TENTATIVE SEMINAR SCHEDULE

Thursday, August 11	Bonita Springs 5001 Coconut Road Bonita Springs, FL 34134 239-444-1234	Rules to Live By (Title Insurance Rules & Regs.) "To Pay or Not to Pay" . . . Judgments & Liens Mr. Fix It (Florida Curative Statutes) Taking Care of Business (Entities)
Thursday, Aug. 18	Sarasota The Ritz-Carlton 1111 Ritz-Carlton Dr. Sarasota, FL 34236 941-809-2000	Let Your Contract Be Your Guide Closing Encounters of the Troublesome Kind Icing on the Cake - A Guide to FL Endorsements
Tuesday, Sept. 13	Jacksonville Location to be Announced	Let Your Contract Be Your Guide Walking a Tightrope: Do's and Don'ts of Doc Prep Closing Encounters of the Troublesome Kind Icing on the Cake - A Guide to FL Endorsements
Thursday, Sept. 22	Destin Location to be Announced	Let Your Contract Be Your Guide "To Pay or Not to Pay" . . . Judgments & Liens Closing Encounters of the Troublesome Kind Taking Care of Business (Entities)
Wednesday, Oct. 19	Deerfield/Miami Hard Rock Hotel & Casino One Seminole Way Hollywood, FL	Rules to Live By (Title Insurance Rules & Regs.) Walking a Tightrope: Do's & Don'ts of Doc. Prep Mr. Fix It (Florida Curative Statutes) Icing on the Cake - A Guide to FL Endorsements
Thursday, Oct. 20	Tampa Hard Rock Hotel & Casino Tampa, FL	Catch Me If You Can - Avoiding Fraud Walking a Tightrope: Do's & Don'ts of Doc. Prep Let Your Contract Be Your Guide Icing on the Cake - A Guide to FL Endorsements



Discover Ways to Increase Your Revenue

■ *Debbie Davids, Esq./Account Manager, Orlando, FL*

Old Republic Title / Florida is proud to announce that we have contracted with Darryl Turner and The Darryl Turner Companies (DTC) to provide sales and marketing seminars for our Florida Agents. As a part of the Old Republic Title SHARED SUCCESS Program developed by Trish Buzzone, Director of Agency Marketing, Darryl will be presenting his exclusive seminars in select cities over the next 12 months. The DTC seminars will kick off our ongoing SHARED SUCCESS Program of comprehensive sales and marketing assistance.

Darryl Turner is a leader in providing title businesses with a full

suite of products and services developed specifically to help increase market share. Founded in 1994 by Darryl Turner, a leading consultant to the national business community, DTC specializes in the advancement of business organizations, especially title businesses, across America. With over twenty years of successful business development experience, Turner employs his dynamic communication style in combination with a unique perspective and practical applications, empowering title companies and individuals to reach and exceed their goals.



We at Old Republic Title are committed to the success of our agents. We cannot succeed unless our agents succeed. The SHARED SUCCESS Program incorporating the DTC Seminars is one way for us to actively assist our agents to build their businesses bigger, better, stronger and more competitive. It's a win-win opportunity. Old Republic Title Agents are encouraged to contact their local Agency Representative for specifics and for information on the dates and locations of Darryl's success-driven seminars.

JUNE 2005



Old Republic National
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100 S. Ashley Drive, Suite 700
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ALTA Junior Loan Policy Approved

■ By James C. Russick, Florida State Counsel

On June 3, 2005, the Financial Services Commission, Office of Insurance Regulation, published its proposed Rule to adopt the ALTA Junior Loan Policy with Florida Modifications. Old Republic Title anticipates that there will be a hearing on July 13, 2005 in Tallahassee relating to this initiative and prior to having a finalized rule at some point later this year.

The ALTA Junior Loan Policy was designed to fill the void created by lenders requiring only an Ownership and Encumbrance Report (O&E) rather than a policy on certain transactions. This has become increasingly popular with the advent of the “blend” mortgages, those situations where the same lender gives a first mortgage simultaneously with either a second mortgage or an equity line mortgage.

Several other companies have attempted to fill this void with a casualty issued mortgage impairment product. These mortgage impairment products threatened both the casualty statute and the monoline statute that protects title insurance as a separate and unique product in the marketplace.

The currently proposed rate for the Junior Loan policy is \$.86 per thousand. Old Republic does not support a rate this low and intends to be at the July 13 hearing to address this and other issues raised by this initiative.

The proposed rule changes may be viewed at the following web site:

<http://faw.dos.state.fl.us/fawframes.html>.

The proposed form can be viewed at the Department web site, www.fldfs.com.

Old Republic Title remains committed to representing the interests of our agents before our regulators. If you have any input on these issues that you wish us to consider, please do not hesitate to contact either Jim Russick or Carolyn Broadwater in the Underwriting Department.

Statutory Way of Necessity

■ By Jeanne Murphy, Florida State Counsel

The Real Property, Probate and Trust Law Section of the Florida Bar initiated Senate Bill 1184 to revise Florida Statutes 704.01(2) pertaining to statutory ways of necessity. The bill revised the criteria for establishing a statutory way of necessity under certain circumstances. Although the bill went through several drafts, the final version was presented and passed during the 2005 legislative session and was signed by Governor Bush on June 13, 2005.

Section 704.01(2), Florida Statutes, is a statutory mechanism providing easements of necessity across adjoining property of certain landlocked properties, where no other means of access exists (i.e. common law right-of-way or a prescriptive easement). The statutory way of necessity serves the public policy purpose of allowing access to landlocked property, so that it may be transformed from useless and unproductive land into valuable and productive property. Once the statutory way of necessity is established, either through agreement or by judicial decree, the owner of the servient property may not arbitrarily block the use of the statutory way of necessity. The statute does provide, however, that the servient owner is entitled to compensation. As originally written, a statutory way of necessity would only come into existence under Florida Statutes 704.01(2) if the landlocked property (1) was situated outside a municipality and (2) was used or was desired to be used as a dwelling or dwellings, for

agricultural, for timber raising or cutting or for stockraising purposes.

The Real Property, Probate and Trust Law Section initiated the bill for the purpose of removing the requirement that the property lie outside a municipality and the requirement that the property be used only for the purposes enunciated in the statute. The rationale was to expand the types of landlocked properties that are entitled to a statutory way of necessity for access. For example, since Duval County is a municipality, any landlocked property in that county which is not entitled to a common law way of necessity would have no statutory means by which to obtain access. Additionally, if the owner of landlocked property wishes to use the property for other than one of the stated purposes, such as a wildlife conservation area, a statutory way of necessity would not be available.

Although the bill passed, it was not passed as originally written. The proposed deletion of the enunciated purposes was viewed as a “developer bill.” The concern was that developers were trying to acquire cheap landlocked properties that would then exponentially increase in value once a statutory way of necessity was established. Although that was not the case, that part of the bill was deleted in the final draft. Accordingly, §704.01(2) was ultimately amended to only remove the requirement that the property be located outside a municipality.

Broker's Lien Bill

By *Jeanne Murphy*

After three years of trying and a veto last year by Governor Bush, the Florida Association of Realtors finally got its controversial commercial broker lien law legislation, HB 1459, passed. The bill was approved by Governor Bush on June 20, 2005. HB 1459 changed last year's legislation in several significant ways. You will recall that last year's bill, which was opposed by the Florida Bar, would have allowed brokers to place a lien against commercial real property if the owner failed to pay a contractually agreed upon commission amount. The new bill reflects a compromise between the Florida Bar Real Property Section and the Florida Association of Realtors and meets the concerns expressed in the Governor's 2004 veto letter. The bill is quite lengthy so this article will only discuss the sections most relevant to your business, including the sections specifically affecting closing agents.

HB 1459 only pertains to the sale of commercial real property, and specifically provides that a commercial real estate broker who has a written commission agreement with the owner of a property has a lien against the owner's net proceeds from the transaction. This is a lien on **personal property**, not real property, but it does prevent closing agents from disbursing the full net proceeds to the owner. The broker must disclose to the owner, in writing, at or before the time the owner executes the commission agreement, that a lien is created for the commission earned by the broker and that the lien cannot be waived except by the broker.

In order to enforce a lien for a commission, the broker must also deliver a notarized "commission notice" as follows:

(1) Within 30 days after a commission is earned and at least one day before the closing, the broker must deliver a copy of the commission notice to the owner of the commercial property and to the closing agent, if the broker knows the identity of the closing agent. (The form for the commission notice is included in the bill.)

(2) If the owner enters into a sales contract without the broker's knowledge, the bill provides that once the closing agent is identified, the notice is still timely if delivered before the closing agent disburses the owner's net proceeds. In such event, the broker must also deliver an affidavit to the closing agent certifying that the reason for the untimely delivery was due to the fact that the broker was unaware of the closing agent's identity.

(3) If the commission notice is not delivered to the closing agent until after disbursement, for whatever reason, it is ineffective and the lien may not be enforced.

Once the broker has delivered the copies of the commission notice to the owner and the closing agent, the broker may record it. The recording of the commission notice perfects the lien against the owner's net proceeds and establishes its priority. However, the recording of the commission notice does not constitute constructive notice to a closing agent unless it has been of record for at least 60 days. A commission notice expires one year after the date of recording unless the commission agreement remains effective for a longer period and the broker extends the notice pursuant to the bill. If a commission notice is recorded and a condition or event occurs that precludes the broker from receiving the commission, or if the commission has already been paid or otherwise discharged, the broker must record a release of the notice within 7 days after demand by the owner or within 7 days after payment or discharge.

A significant portion of the bill deals with the rights and duties of the closing agent in connection with the lien. These rights and duties include:

■ If the closing agent has received a timely commission notice, has constructive knowledge of a commission based upon a commission notice that has been of record for at least 60 days, or has actual knowledge of a commission notice, the closing agent must reserve the amount of the commission from the owner's net proceeds.

■ If the owner's net proceeds are insufficient to pay the full amount of the claimed commission, the closing agent must reserve all of the owner's proceeds.

■ The closing agent may require the owner to provide an affidavit regarding the existence or terms of any commercial broker agreement, including any commission, in connection with the transaction.

■ If the closing agent receives an affidavit from the owner, the closing agent must reserve the amount of the disclosed commission from the owner's net proceeds, even if the owner disputes the commission.

■ If the owner's affidavit discloses a commission amount different than the amount in the commission notice, the closing agent must reserve the greater of the two commissions.

■ If the closing agent has not received a commission notice but has received an owner's affidavit stating that there is no broker commission agreement, the closing agent has no duty to reserve any money from the owner's proceeds.

■ If the closing agent determines that the owner's net proceeds are insufficient to pay the full amount of the claimed commission, the closing agent must notify the owner and the broker within 3 days after making that determination, but no later than the closing. A shortage in the owner's net proceeds does not relieve the owner from his contractual obligations to pay the full commission owing to the broker under the brokerage agreement.

■ Upon request of the closing agent, the broker must provide a release of any recorded commission notice, the funds for which are to be held in escrow pending closing. Additionally, under the bill, the closing agent is authorized to deduct the cost of recording the release from the broker's reserved proceeds.

■ If a commission is due the broker, the closing agent must release the confirmed amount of

continued on next page

Broker's Lien Bill *continued*

the commission to the broker from the reserved net proceeds. The settlement statement signed by the owner and showing the payment of a commission to the broker is confirmation by the owner of the amount of commission.

If a dispute arises regarding the amount of commission, the bill specifically prohibits the closing agent from releasing the disputed reserved proceeds to either party until the rights of the owner and broker are determined or they reach an agreement in writing. Although this puts the closing agent in the middle of the parties' dispute, the bill includes some protections for the closing agent. For example:

- The closing agent is not liable to the owner, the broker, or any other person in any civil action for actions taken in compliance with the bill;
- The closing agent is not required to involuntarily hold disputed reserved funds for more than 5 days after closing. Rather, the closing agent may interplead or otherwise institute a legal proceeding to adjudicate the rights of the parties with respect to the disputed reserved proceeds. Additionally, prior to depositing said funds with the court, the closing agent may deduct the closing agent's costs in commencing said action, including reasonable attorney fees.

If a commission notice has been recorded, upon depositing the funds, the closing agent must record an affidavit certifying that the disputed reserved proceeds have been deposited with the clerk. Recording the affidavit operates as a release of the commission notice. The closing agent is thereafter relieved of any further liability or responsibility concerning the reserved proceeds.

HB 1459 only deals with the owner's real estate broker, not the buyer's broker. Accordingly, a written contract between a buyer and a buyer's broker for the payment of a commission does not fall within the bill, and the buyer's broker is not entitled to record a commission notice or claim any interest against the owner's net proceeds from the sale of commercial property.

The bill also includes a section relating to commissions due under commercial lease transactions. In lease transactions, HB 1459 allows a broker who has entered into a written commission agreement with a commercial property owner to place a lien upon the owner's interest in the property if the owner does not pay the agreed commission. If the commission agreement is with a tenant, the broker can place a lien on the tenant's leasehold interest. A full discussion of this lease commission provision is beyond the scope of this article. If you are insuring a commercial lease transaction, please contact the Underwriting Department for more information.

No More Oil, Gas and Mineral Reservations!!

■ *By Linda M. Hernandez, Florida State Underwriter*

OGM (oil, gas and mineral) reservation exceptions will be a thing of the past after July, 2005!

On June 1st, Governor Bush and the Cabinet entered into a settlement with Coastal Petroleum that will be finalized in July, to buy back two off-shore drilling leases along the Gulf Coast **and** a drilling lease for Lake Okeechobee.

As a result of this settlement, Florida's coastline will be protected from off-shore drilling from Apalachicola to Naples and Florida will, once again, gain control of all mining leases in its coastal waters.

During the 1940s, the Trustees of the Internal Improvement Fund entered into three leases with Coastal Petroleum Company, granting them the right to produce oil, gas and sulphur. As a result, title insurers began raising exceptions for "oil, gas and mineral reservations." These leases affected Florida's offshore lands beginning at the natural water's edge seaward from St. George Island in Franklin County, south to a point in Collier County; all the water bottoms lying within the boundaries of Lake Okeechobee; and all the water bottoms lying within the boundaries of many other Florida's lakes and rivers. After several major lawsuits, the initial impact of these leases lessened, but we were still, nevertheless, required to raise an exception for:

"any and all residual royalty rights of Coastal Petroleum Company, or its assigns, which does not include the right of entry for exploration, mining or drilling."

After all these years, we will not need to be concerned with this issue much longer.

What's Happening In Our Capitol?

■ *By Carolyn Broadwater, Florida State Counsel*

On June 17, 2005, Senate Bill 370 was signed by the Governor. This bill rewrites certain provisions of Chapter 55 relating to the satisfaction of judgments and amends §222.01, the Notice of Homestead statute, to include **all** Chapter 55 judgments.

Also on the Governor's desk is House Bill 531 that will authorize title insurance agents to act as agents of the mortgagors or mortgage servicer in order to issue certificates of release for mortgages paid at closing. The bill includes specific procedures to follow and outlines the terms of the certificate of release and liability of the title agents who will issue them.

Compliments of
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YOUR SOURCE FOR UP-TO-DATE 1031 EXCHANGE NEWS

New Legislation Imposes a 5-Year Holding Requirement for Principal Residences Formerly Held as Investment Property

As many investors are aware, property acquired in an IRC §1031 exchange may be converted from investment property to the taxpayer's principal residence. In short, a taxpayer could buy property in an exchange—having deferred gain from the sale of other investment property—and later convert that property to a principal residence. The previously deferred taxes may never be owed when the property is subsequently sold because the taxpayer is entitled to a principal residence exclusion under IRC §121.

IRC §121 provides a taxpayer with an exemption from taxes on the gain from the sale of the taxpayer's principal residence if the taxpayer used the property as a principal residence for periods aggregating 2 years or more within the previous 5 years. The gain excluded from the payment of tax is \$250,000 for individuals or \$500,000 for married couples.

The new legislation—H.R. 4520—provides, in pertinent part, as follows:

If a taxpayer acquired property in an exchange to which a §1031 applied, §121(a) shall not apply to the sale or exchange of such property if it occurs during the 5-year period beginning with the date of the acquisition of such property.

Now, pursuant to this new legislation, a taxpayer intending to take advantage of the §121 exclusion with regard to property originally acquired in a §1031 exchange, will not be entitled to the §121 exclusion, unless the property has been held by the taxpayer for more than 5 years and used as the taxpayer's principal residence for at least 2 of the 5 years.

Example of New Rule: 5 years and 1 day



Example of Old Rule: 4 years

