

HIGH RISK TRANSACTIONS

Presented By

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I. Introduction

A. High liability means high risk. Each agent has a “single risk liability,” requiring underwriter approval for transactions that exceed that dollar threshold. But the converse is not also true. Transactions below that single risk liability may also present unique risks that warrant underwriter review and approval. The purpose of this outline is not to deal with all such issues comprehensively, but to present such issues comprehensively enough to garner appreciation for why such issues present risks warranting underwriter approval.

II. Title Derived Through Governmental Procedure

A. Were the rules followed?

B. If rules were not followed, a total failure of title can result

C. Examples:

1. Tax sales (see below)
2. Federal foreclosure
3. Sheriff sale
4. Deed from Federal Marshall
5. Sale following drug forfeiture
6. Eminent domain/condemnation
7. IRS foreclosure
8. Escheated property now sold by the Commonwealth
9. Insuring property owned by an Agency of the Commonwealth years after acquisition

III. Tax Sales

A. Va. Code §§ 58.1-3965 *et seq.*

B. Sales prior to July 1, 1997: ORT will not insure non-judicial tax sales. Must have court order with proper notice

C. Key inquiry: did owner receive property notice?

1. U.S. Supreme Court Case of Jones v. Flowers, 547 US 220 (2006) is a concern. Jones overturned a tax sale where the notice to the owner, at the property address, was returned as undeliverable. The Court said:

- a) “We hold that when mailed notice of a tax sale is returned unclaimed, the State must take additional reasonable steps to attempt to provide notice to the property owner before selling his property, if it is reasonable to do so. . . . We do not think that a person who actually desired to inform a real property owner of an impending tax sale of a house he owns would do nothing when a certified letter sent to the owner is returned unclaimed.”

- D. Balancing test:
 - 1. What efforts were made to satisfy notice requirement?
 - 2. How old is the tax sale?
 - 3. Sale or refi?
 - 4. What is the policy limit?

- IV. Course of Descents
 - A. Va. Code § 64.2-200 (various versions—see attached)
 - B. If tracing heirs through the years, make sure that you are using the correct version of the Course of Descents for the date of death you are evaluating.

- V. Present or Threatened Title Litigation
 - A. Va. Code §§ 8.01-268, 8.01-269
 - B. A memorandum of *lis pendens* (Latin for “lawsuit pending”) is a notice recorded in the land records of a city or county to indicate that a lawsuit is pending affecting the lands where the notice is recorded. A memorandum of *lis pendens* does not, in itself, create or enforce a lien—it merely provides notice of the pending lawsuit.
 - C. Standard coverage under owner’s and loan policies include the duty to defend.
 - D. We do not want to “buy a problem,” so when litigation is present or threatened we generally decline to insure or insure with exceptions to such matters.
 - E. Virginia Code § 8.01-268(B) requires that such lawsuit must involve some claim of interest. That code section states that:
 - 1. [n]o memorandum of lis pendens shall be filed unless the action on which the lis pendens is based seeks to establish an interest by the filing party in the real property described in the memorandum.
 - F. Sometimes, a lis pendens is filed as a pretense in an effort to leverage a settlement, when in fact there is no arguable interest sought in real property.

- VI. Illegal Subdivisions
 - A. Va. Code § 15.2-2254(4).
 - B. Defined as “any adjustment to a boundary line that does not comply with the relevant subdivision ordinance.”
 - C. Violation of a subdivision ordinance could generate a title claim pursuant to covered risk 16 of the Homeowner’s Policy
 - D. In many cases the relevant subdivision ordinance is not the current ordinance

E. The first state-level regulation of subdivision development related to the laying out of cities, towns and suburban lots, and did not require plats to be approved by any governmental authority.¹ Between 1922 and 1946, the General Assembly adopted, modified, and amended legislation that allowed cities and towns to require government approval of subdivision plats if (and only if) the locality adopted a comprehensive plan for future development.² In 1946, the General Assembly adopted the precursor of the current act “to assure the orderly subdivision of land and its development.”³ The original act authorized, but did not require, that cities, towns and counties adopt local subdivision ordinances.⁴ Under current law, every locality must adopt a subdivision ordinance.

F. Once a locality has adopted a subdivision ordinance, then “[n]o person shall subdivide land without making and recording a plat of subdivision” that complies with both state and local requirements, “[n]o plat of subdivision shall be recorded” without the required government approval, and “[n]o person shall sell or transfer any land of a subdivision [. . .] before a plat has been duly approved and recorded.

G. Subdivision ordinances are not uniform among localities. Localities use the definition of the term “subdivision” to limit or expand the scope of the local subdivision ordinance.

H. Penalties for violating the subdivision ordinance are set by Virginia statute and local subdivision ordinances. Section 15.2-2254(4) of the Code of Virginia authorizes a fine of “not more than \$500 for each lot or parcel of land” improperly subdivided, transferred or sold. Further, the violator “shall be required to comply with all provisions of [the state statute] and the [local] subdivision ordinance.”⁵ Local penalties, which vary by locality, may include fines, misdemeanor charges, the inability to obtain a building permit or other city permits until the violation is resolved, and even the nullification of prior authorized permits.

I. In 2003, the Washington Post shared the stories of two Fairfax County residents whose lots had been subdivided illegally. One reported that he “paid thousands of dollars in county permit fees and engineering and legal fees,” in addition to losing, according to his estimate, \$60,000 to \$70,000 in “construction-related delays, including charges to extend his loans and extra legal bills[.]” The other lost a \$1.295 million sale to a developer because her lot’s parent parcel had been subdivided improperly in 1938.

VII. Contracts for Deed

A. Also known as installment sales contracts, land contracts, and purchase agreements (usually standard forms promulgated by the state bar association or state real estate brokers association)

B. Can be insured separately or simultaneously.

C. Since purchase agreements rarely give the purchaser an immediate right to possession, the purchaser's interest in them should never be insured unless the agreement is recorded.

D. Schedule B info:

1. *Contract for deed by and between Marvin Dows and Winifred Dows, husband and wife, sellers, and Henry C. Jones and Grace R. Jones, husband and wife, purchasers, dated _____, filed _____ in Book _____ of _____, page _____.*

E. Since the seller's interest in a contract for deed is a financing mechanism, it may be insured using a loan policy or an owner's policy. If an owner's policy is used, an exception should be made to any claim that the insured interest constitutes an equitable or disguised mortgage.

F. If a loan policy is used, Paragraph 4 in Schedule A should be amended to recite the fact that a contract for deed, and not a mortgage, is being insured, and the contract should be described. Exception should also be taken in Schedule B1 to the "*terms and conditions of the contract . . .*"

G. The purchaser's interest, when the agreement is recorded, should be insured using an owner's policy. Paragraph 2 of Schedule A should be amended to recite the interest as "contract purchaser's interest" or "contract vendee's interest" instead of "fee simple estate," and the contract should be described. Exception should also be taken in Schedule B to the "*terms and conditions of the contract . . .*"

VIII. Transactions Refused by Other Underwriters

A. Va. Code § 38.2-612

“No insurance institution or agent may base an adverse underwriting decision in whole or in part on the fact of a previous adverse underwriting decision”

IX. Churches, Religious Organizations, Unincorporated Associations, Benevolent Associations

A. Va. Code § 57-8, 57-12, 57-16.1

B. A trustee and/or court order may be necessary for the transfer or encumbrance of real estate by a church, depending on how that church is organized (e.g., incorporated versus incorporated)

C. Discovering who has the authority to sign on behalf of the church may depend on church documents, which may no longer exist

D. Dissolved churches can also be difficult to administer

E. Benevolent Associations

1. Volunteer Fire Groups

2. Masons/Moose/Elks

3. Swimming Associations/neighborhood pool groups

- X. Estate Issues
 - A. Va. Code §§ 64.2-528, 64.2-532, 64.2-535
 - B. Creditors of a decedent have one year from date of death to make a claim, or they will be unable to make the claim against the real estate.
 - C. ORT charges extra hazardous risk premium if a seller of an estate wants to receive proceeds within this timeframe. Premium is \$2.00/\$1,000 of the gross proceeds, per rate manual. Minimum is \$200. Entire amount is remitted to ORT.

- XI. Zoning Endorsements
 - A. ORT Rate Manual states that extra hazardous risk premium for Zoning Endorsement (100% payable to ORT) may be up to 10% of title insurance premium.
 - B. The impact of government regulations, including building and zoning ordinances, are specifically excluded from coverage under our standard Owner's and Loan policies pursuant to Paragraph 1(a) of the Exclusions From Coverage section. The ALTA 3-series of endorsements provides assurance that the land described in the policy is zoned in a specific classification, and lists one or more of the uses allowed in that classification

- XII. Indian Tribes
 - A. 25 U.S.C. § 483
 - B. Thomasina E. Jordan Indian Tribes of Virginia Federal Recognition Act of 2017: Once signed by the president, the legislation will grant federal recognition of six Virginia tribes: the Chickahominy, the Eastern Chickahominy, the Upper Mattaponi, the Rappahannock, the Monacan, and the Nansemond.
 - C. Pamunkeys may have been recognized earlier.
 - D. "Indian land" includes reservation land and non-reservation land
 - 1. Reservation land
 - a) *Sometimes the existence of the reservation or boundaries are in dispute*
 - b) *Tribal and Indian-owned titles within a reservation*
 - (1) May be subject to federal restrictions, held in trust by the U.S., or owned in fee simple. Only the later is freely alienable. Otherwise, federal authorization must be obtained and evidenced for sale and mortgage transactions.
 - c) *Fee titles owned by persons other than a tribe or tribally owned entity or political subdivision, agency or instrumentality*
 - (1) Not subject to federal restrictions
 - (2) Do not rely on tax sales or forfeitures, execution sales, state deeds or even a quiet title action as a root of title since prior Indian owners may have been improperly deprived of their title

- d) *Use ALTA US Policy for insuring title in trust for a tribe*
 - (1) *Special exceptions due to 2 Supreme Court Cases: Carcieri and Patchak*
- e) *Lack of access is always an issue*
- f) *Evidence of title may also be present in tribally maintained records*
- g) *Recording of documents may occur in state offices, but trust land documents may be found in the Land Titles and Records Offices maintained by the Division of Land Titles and Records, Bureau of Indian Affairs*

2. Non-reservation land

- a) *Tribes, tribally-owned entities and individual Indians purchase and own off-reservation lands. Title may be owned in fee or restricted status (commonly in an allotment in the case of individuals), held in trust or placed into trust after acquisition by the owner. Until tribally owned fee land is conveyed into trust, the tribe or a tribally owned entity is subject to the Nonintercourse Act restrictions, meaning that the land is not unless the conveyance is authorized by an act of Congress, federal statute or treaty. A tribe that is buying fee land within a reservation may be insured using the form of policy required in your state and no unique exceptions are required.*

XIII. HOA/Condo Foreclosures

- A. Va. Code §§ 55-508, 55-516, 55-79.84
- B. *Board of Directors of Colchester Towne Condominium Council of Co-Owners v. Wachovia Bank*, 266 Va. 46, 581 SE2d 201 (2003)
- C. *Wilburn v. Pinewood Lawns Condominium Phase I Council of Co-Owners*, 65 Va. Cir. 372 (2004)
- D. HOA/Condo foreclosures are high risk transactions because:
 - 1. They are untested in the courts
 - 2. There are various interpretations of priority of liens
 - 3. Technical requirements of the statute, such as advertisement, notice, verification of the liens by an officer or officers as the HOA/condo instruments may specify
- E. *Colchester Towne*: VA Supreme Court Case that affirmed that bank's lien had to be paid first out of proceeds from HOA sale.
- F. *Wilburn*: set aside condo foreclosure sale for failure to follow technical requirements
- G. See "Enforcing HOA Liens" (attached)
- H. ORT requires a judicial foreclosure to insure

XIV. Options

- A. Va. Code §§ 11-1, 55-95, 55-57.1, and 55-57.2
- B. Whether an option can be an interest in land in Virginia is not settled. Arguments can be made on both sides of the issue. Currently an option seems to be more a contract right, rather than an actual interest in land, which is a conservative viewpoint.

XV. Self-dealing POAs

- A. Be especially suspicious when an attorney-in-fact uses the POA to his or her own benefit. When an attorney-in-fact exercises a power of attorney to his or her own benefit, it is presumptively fraudulent.⁶ An example might be when a wife purports to have a POA for her husband, and she is administering a cash-out refinance.
- B. Some questions:
 - 1. Why can't the principal sign the closing papers?
 - 2. What kind of transaction—sale or refi?
 - 3. What is the purpose of the transaction?
 - 4. Can the answers to any of these questions be corroborated by the principal or independent third parties?

XVI. Access

- A. Both owner's and loan policies insure access. Failure to obtain access may result in a total failure of title, triggering a claim up to policy limits.
- B. When access is obtained by private road, be especially careful.

XVII. Railroad and Rails to Trails

- A. Chains of title through railroads present numerous underwriting issues and therefore must be submitted to your supervisory office for review and determination of insurability before issuing a commitment. This is particularly true as rights of way no longer in use remain valuable as corridors for public use such as recreation trails or regional rail services. Issues most likely to be discussed include:
 - 1. How did the railroad acquire the property?
 - 2. What limitations affect the railroad's sale of its property?
 - 3. Is the sale regulated?
 - 4. Must governmental or private reversion or first refusal interests be considered?
 - 5. How does abandonment or non-use of a line affect title to the property?
 - 6. Are the legal descriptions sufficient to insure?
 - 7. Must "blanket" mortgages or deeds of trust and supplements be released of record?

8. How is railroad ownership affected by state law issues such as adverse possession?
 9. Because railroad rights of way cover large tracts and often parallel public roads or highways, do they block access to adjoining property which needs to be insured?
- B. Chains of title through railroads are often incomplete and may be completed or supplemented by records obtainable only through the records of the railroad itself. The real estate department of the railroad is an important resource to the title examiner.
- C. Access is often an issue whenever you have access via a non-public road which crosses a railroad line. We can't insure access. It is very difficult to get the legal right to cross the railroad line, even if it's been done for 100+ years.

XVIII. Timberland and Timber Rights (Crops)

- A. Some of the Virginia statutes affecting timber and crops are:
1. § 8.9A-302. Law governing perfection and priority of agricultural liens.
 2. § 8.9A-308. When security interest or agricultural lien is perfected; continuity of perfection
 3. § 8.9A-310. When filing required to perfect security interest or agricultural lien; security interests and agricultural liens to which filing provisions do not apply.
 4. § 8.9A-334. Priority of security interests in fixtures and crops.
 5. § 10.1-1703. Acquisition of title subject to reservation of farming or timber rights; acquisition of easements, etc.; property to be made available for farming and timber uses.
 6. § 59.1-114. Unlawful cutting down, possessing or converting branded timber.

XIX. Water Rights

- A. Va. Code §§ 28.2-1202, 28.2-1202, 28.2-600
- B. Smith Mountain Lake and Lake Anna property
1. No access to the shore line
 2. Lake Anna is owned by VEPCO
 3. Access to water is accomplished by easements to some lots but not others
 4. Appalachian Power made Smith Mountain Lake: no interest in the bed or shore line
- C. Issues with the Potomac (borders Maryland)
- D. Title to Land Under or Formerly Under Navigable Waters
1. State owns navigable waters: Appomattox, James, New, Rappahannock and Jackson Rivers.

2. Title to land abutting navigable waters goes to low water mark; State owns below low water mark.
 3. Beds of non-navigable waters are owned by the owner of the shore line to the middle of the stream, lake, etc.
- E. Oyster beds
1. Ownership of 205 feet or more of water frontage entitles a landowner to apply for a half-acre of oyster planting ground from the State
- XX. DOT Released Without Sale/Refinance
- A. Va. Code § 55-66.10
 - B. May be evidence of a fraudulent release
 - C. Where did the money come from?
 - D. Forged release?
 - E. Have the title examiner double-check?
 - F. Consult owner; obtain an affidavit.
 - G. Per Va. Code § 55-66.10, lender can record a document of rescission, which (in the case of a fraudulent release) would reinstate the effect of a deed of trust, but such reinstatement would have no effect on a bona fide purchaser for value.
- XXI. Disclaimers
- A. Va. Code § 64.2-2-2600 *et seq.* (Uniform Disclaimer of Property Interest Act)
 - B. An interest in real property received by an estate may be wholly or partially disclaimed
 - C. When people attempt to disclaim an interest in an estate, often consequences can occur.
 1. Example: In a handwritten disclaimer, woman disclaims interest, leaving it all to brother; one cannot direct the interest; the effect of a disclaimer is that the one who disclaims is treated as predeceasing the decedent; in this case, disclaimed interest went to minors.
 - D. Can't work out a deal (disclaimer in exchange of something)
 - E. Notice must be given to personal representative (e.g., Executor); therefore, attempts to disclaim after estate is closed is void
 - F. One attempting to disclaim cannot take possession or control the property in any way, such as paying taxes or bills or occupying property
- XXII. Medical liens and TBE Status
- A. Va. Code § 8.01-220.2

B. Any judgment docketed against a current owner in favor of a medical service provider must be paid when that owner refinances or sells his/her primary residence, regardless of the fact that such owner is on title with his/her spouse as tenants by the entirety (TBE). The judgment must still be paid. TBE status shall NOT insulate such owner from the lien.

C. Note that this rule pertains in the case of a refinance and when the property is “transferred to a new owner,” which on its face includes new purchasers, foreclosures and donative transfers (i.e., deeds of gift, deeds of confirmation, etc.).

D. This exception does not apply to all medical care but only to “emergency medical care . . . including all follow-up inpatient care provided during the initial emergency admission,” etc. Contact us if you wish to offer sufficient evidence that the medical care at issue was not of an emergency nature in your effort to determine that the exception does not apply.

E. As a general rule, a judgment docketed prior to a judgment debtor taking title does NOT have priority over a Purchase Money Deed of Trust. And if said Deed of Trust is used to foreclose on the subject property, that prior judgment is wiped out along with other subordinate liens. We see no reason to abandon that position here in view of the recent change to Va. Code § 8.01-220.2 above. That general rule still applies.

XXIII. Quit Claim Deeds

A. When a claim is paid, owner’s and loan policies allow the title insurer to “stand in the shoes” of its insured and take advantage of any rights the insured would otherwise be entitled to. Quit claim deeds, which contain no warranties, cut off that channel of recourse. So in general, ORT will not insure a transaction where the current deed is a quit claim deed.

B. Exception: Deeds from FHA.

¹ § 41-3(a) p. 411 Virginia Title Examiner’s Manual. Citing Statutes.

² *Id.*, §(b).

³ *Id.*, and statute(s)

⁴ *Id.*, and statute(s)

⁵ §15.2-2254(4)

⁶ *Grubb v. Grubb*, 272 Va. 45 (2006).

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Virginia Course of Descent [Va. Code Sec. 64.2-200]

	July 1, 1990 to present	July 1, 1985 to June 30, 1990	July 1, 1982 to June 30, 1985
1st	ALL to the surviving spouse of intestate decedent IF all children of decedent are also children of surviving spouse. IF decedent is survived by children of their descendants NOT also children of surviving spouse, 2/3 to children, 1/3 to surviving spouse. Dower & Curtesy abolished as of 1/1/91.	To the surviving spouse; but if intestate survived by children or their descendants NOT children of surviving spouse, all to intestate's children, subject to dower or curtesy rights of surviving spouse (1/3 fee simple)	Same as 1985-1990
2nd	If no spouse, all to intestate's children and their descendants.	2-11 same as current	If no surviving spouse, to intestate's children and their descendants
3rd	If none, to father and mother, or survivor		3-11 same as current
4th	If none, to brothers and sisters and their descendants		
5th	If none, one moiety (half) to paternal kindred and one moiety to maternal kindred as follows*:		
6th	To grandfather and grandmother, or survivor.		
7th	If none, to uncles and aunts and their descendants.		
8th	If none, to great-grandfather(s) and great-grandmother(s).		
9th	If none, to brothers and sisters of grandfather(s) and grandmother(s) and their descendants.		
10th	Continue, passing to nearest lineal ancestors and their descendants.		
11th	If no paternal kindred, to maternal kindred; if no maternal kindred to paternal kindred; if neither, to kindred of spouse in like manner as if spouse died entitled to the estate		

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Virginia Course of Descent [Va. Code Sec. 64.2-200]

	July 1, 1956 to June 30, 1982	March 29, 1923 to June 30, 1956	July 1, 1922 to March 28, 1923	January 1, 1787 to June 30, 1922
1st	To children and their descendants, subject to surviving spouse's 1/3 fee dower or curtesy interest from 7/1/77 to 12/31/91; and 1/3 life estate dower or curtesy interest from 7/1/68 to 6/30/76; dower and curtesy interests applies when decedent died without issue, and were subject to creditors of decedent 3/20/24 - 6/30/68	To children and their descendants.	1-5 same as 1923 - 1956	Children and descendants (same as 1922-1956)
2nd	If none, to Surviving spouse	If none, to father and mother, or survivor		If none, to father (Not to mother)
3rd	3-11 same as current	If none, to brothers and sisters and their descendant.		If none, to mother, brothers and their descendants.
4th		If none, to surviving spouse		If none, paternal and maternal moieties as follows:
5th		If none, one moiety to paternal and maternal kindred as follows:		To the grandfather.
6th		6-11 same as current	To Grandfather and grandmother (did not provide for alternate descent to survivor).	If none, to the grandmother, uncles and aunts on the same side and their descendants
7th			If none, to great-grandfather(s) and great-grandmother(s).	If one, to great-grandfather(s).
8th			If none, to brothers and sisters of grandfathers/grandmothers and their descendants and so on, passing to nearest lineal ancestors and their descendants.	If none, to great-grandmother(s) and brothers and sisters of grandmothers and grandfathers, and their descendants.
9th			If no maternal or paternal kindred, to kindred of surviving spouse, in like course. [Note: Aunts and uncles appear to be excluded from this course of descent.]	And do on, to nearest lineal male ancestors, or, if none, to female ancestors in the same degree, and their descendants.
10th				If no issue, father, mother, brother or sister, nor any paternal kindred, the whole to the maternal kindred; if no maternal kindred, the whole to the paternal kindred: if neither, the whole to the surviving spouse of the intestate; or if none, to the deceased's spouse's kindred in like course.
11th				