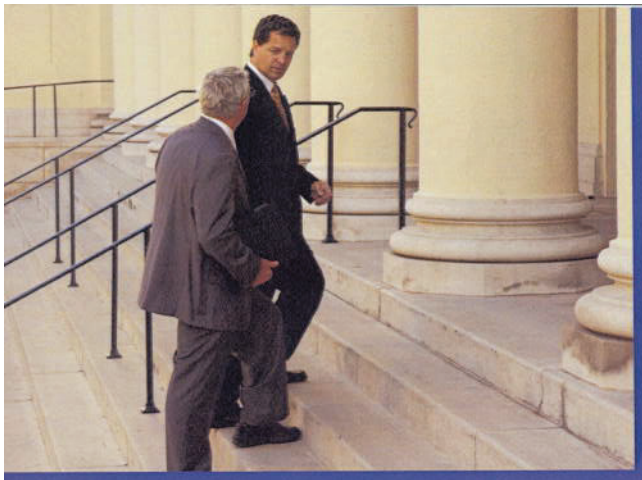

Title Law Quarterly

AMERICAN LAND TITLE ASSOCIATION

The Quarterly Newsletter for Real Estate Attorneys ⇔ Volume 5, Issue 3

In This Issue

Send submissions to Steve Gottheim at sgottheim@alta.org

Calendar of Events

2015-16 ALTA Conferences and Meetings

Annual Convention
October 7 - 10, 2015 — *Boston*

Business Strategies Conference
March 16-18, 2016 — *Indianapolis*

To register, go to www.alta.org/meetings

Lenders Continue to Announce Best Practice Requirements for Closing Attorneys

Implementation of the TILA-RESPA Integrated Disclosures (TRID) is nearly here. If your law firm handles closings, hopefully you've had conversations with your lender clients and have a good understanding of how data will be shared, who will prepare the Closing Disclosure and how corrections will be made.

It's also important to remember that it will take longer to get transactions closed. Real estate agents are altering purchase agreements to reflect a longer timeline and adding contingencies to contracts. If you're looking for more information about TRID, please check out ALTA's blog at *blog.alta.org.*

As TRID implementation neared over the summer, several lenders started to announce their requirements to prove implementation of ALTA's "Title Insurance and Settlement Company Best Practices" to prove compliance with third-party oversight required by the CFPB.

SunTrust Bank has indicated that in order to remain eligible to close loans for the bank, all settlement service providers must have completed an ALTA Best Practices self-assessment by July 1. Meanwhile, IBERIABANK Mortgage Co., American Bank & Trust and Gulf Coast Bank & Trust Co. all issued letters indicating they will require approved closing attorneys to receive an independent, third-party certification of compliance with ALTA's Best Practices prior to TRID implementation.

To help law firms show Best Practice compliance, ALTA published a member-exclusive, 32-page Best Practices Compliance Management Report, which can be completed and provided to lenders. Law firms can customize the report by adding their logo and name. The report includes pages that, once complete, will provide a snapshot of where a firm stands in adoption of ALTA's Best Practices. ALTA members seeking a review by a third party (if required) can use the final section of the report.

Completing a self-assessment is a good first step, but law firms should communicate with lenders to determine whether they will require a third-party certification. It's important to remember that whether a lender has a closing attorney list, a few approved closing attorneys or hundreds of them, the lender is responsible for ensuring that each closing attorney can safely meet the needs of the lender, protect the consumer and satisfy all involved in the closing transaction.

For more information about ALTA's Best Practices, go to *www.alta.org/bestpractices.*

Court Clarifies Coverage for Mechanics' Liens Arising from Failed Construction Projects

Citation: BB Syndication Services Inc. v. First American Title Ins. Co., No. 13-2785 (7th Cir. Mar. 12, 2015)

Facts:

BB Syndication Services Inc. agreed to lend funds to Trilogy Development Company for construction of a large commercial project in Missouri. The project almost immediately began experiencing cost overruns, but BB Syndication continued funding the project. Eventually, Trilogy failed to pay the general contractor, who stopped all construction, and numerous subcontractors filed mechanics' liens against the property. BB Syndication therefore cut off additional funding, and additional contractors filed mechanics' liens. Trilogy sought bankruptcy protection. BB Syndication submitted a lender's policy claim to First American Title Insurance Co., which denied the claim on the basis that in cutting off funding for the project BB Syndication created the liens and, therefore, exclusion 3(a) of the title policy, which excludes liens "created, suffered, assumed or agreed to" by the insured, applied. BB Syndication then filed suit against First American, claiming it had breached its duty to defend BB Syndication in the bankruptcy proceeding and denied coverage in bad faith. A federal district court ruled in favor of BB Syndication on its duty to defend claim, but ruled in favor of First American on the denial of coverage issue.

Holding:

On appeal, the United States Court of Appeals for the Seventh Circuit noted that most courts applying Exclusion 3(a) do so only when there is some fault, misconduct or breach of duty by the insured. The Court concluded that BB Syndication had responsibility to discover and prevent the cost overruns on the project and viewed its willingness to continue making advances in the face of known cost overruns as a risky business decision. Furthermore, finding that coverage existed would create a windfall for the insured because it had the sole discretion to continue or cease funding and could therefore shift the risk of loss to First American. Important to the Court also was the fact that other financial products are available to protect lenders against cost overruns. Alternatively, the lender could have bargained, but did not, with First American to not invoke Exclusion 3(a) in the event of insufficient funds, which is referred to as the "Seattle Endorsement." It held, therefore, that BB Syndication either created or suffered the mechanics' liens and as result of Exclusion 3(a) there was no title insurance coverage for the liens.

Relevance to the Title Industry:

Exclusion 3(a) is one of the most litigated provisions in the standard lender's policy. This opinion provides title insurance companies with legal support and multiple arguments for denying any duty to indemnify insured lenders for mechanic's liens filed against construction projects that fail due to financing problems. Title insurance companies should expect, however, that construction project lenders may try to obtain a "Seattle Endorsement" for the reasons stated in the opinion.

– James L. Windsor of the law firm Kaufman & Canoles PC can be reached at *jlwindsor@kaufcan.com.*

Bankruptcy Court Says Insurer's Judgment Exempt from Discharge in Debtor Fraud Case

Citation: In re: Denise Roberts-Dude, Case No. 13-13620, in the United States Court of Appeals for the 11th Circuit (Feb. 11, 2015).

Facts:

Bank of America (BoA) held a junior mortgage on property that was subject to a senior mortgage that exceeded the present value of the secured property. In the event of a foreclosure by the senior mortgagee, BoA's junior secured interest would therefore be essentially valueless. The debtor filed a Chapter 7 bankruptcy and moved the Bankruptcy Court for an order under §506(d) of the Bankruptcy Code, stripping off or voiding BoA's underwater junior mortgage.

Holding:

The Bankruptcy Court, District Court and 11th Circuit all held that BoA's mortgage could be voided and stripped off the property. In a June 1, 2015, unanimous decision, the U.S. Supreme Court reversed the lower court decisions and held that a bankruptcy debtor may not avoid a junior lien in a Chapter 7 proceeding even though that junior lien was completely underwater. The court based its decision on its 1992 decision in Dewsnup v. Timm, in which the court held that a partially underwater junior lien could not be stripped down to the value of the debtor's equity in the collateral securing the junior lien.

Relevance to the Title Industry:

This decision resolves a split among the federal circuits and provides clear guidance to the title industry regarding the use of the Bankruptcy Code to fully or partially eliminate the lien of a junior mortgage or deed of trust in a Chapter 7 proceeding when the market value of the debtor's property is less than the amount secured by a senior lien.

– Jeffrey Lang, vice president and underwriting counsel for Old Republic National Title Insurance Co., can be reached at *jlang@oldrepublictitle.com*.