REAL ESTATE LAW PRACTICE "KEYPOINTS"

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In addition to encouragement from the Illinois Institute of Continuing Legal Education and the Illinois State Bar Association's Real Estate Section Council, it should be noted that **Chicago Title Insurance Company** helps underwrite the monthly production of these real estate law "Keypoints". **Chicago Title** is committed to the role of attorneys in real estate transactions and their continuing education in this area. Its staff attorneys are pleased to offer their view points on various developments in the law as set forth below from the perspective of a title company serving the public and the attorneys who represent their clients in real estate transactions.

1. MORTGAGE FORECLOSURE; FORECLOSURE AND REDEMPTION BY A JUNIOR MORTGAGEE:

Practitioners in the mortgage foreclosure arena have been waiting for a long time, (at least 1987), for a case to resolve a conflict between case law and the provisions of IMFL relating to the rights of a subordinate mortgage holder not made a party to a foreclosure; i.e., does a junior mortgagee have a right of redemption or what? The recent case React Financial v. Long, (3rd Dist., May, 2006), http://www.state.il.us/court/Opinions/AppellateCourt/2006/3rdDistrict/May/3050438.pdf comes pretty close to answering the questions…but not quite. Beginning by noting that IMFL in 1987 "substantially reorganized and modified the law as it then existed.", this case deals with the "rights and obligations of a junior mortgagee following a foreclosure by a senior mortgagee". React Financial was the holder of a second mortgage made by the Longs by assignment. The Longs defaulted on their first mortgage with Union Bank, which lead to a foreclosure that did not name React as a party defendant. Union Bank purchased the property at the foreclosure sale and then brought a declaratory judgment action to adjudicate that the React mortgage had been foreclosed. In the interim, Union Bank sold the property to one Louis Olivero. (One wonders what these people doing here ??) Thereafter, the trial court granted React's motion to dismiss the declaratory action based on the fact that neither it nor its predecessors were made parties to the preceding foreclosure. Then, payments went into default on the second (React) mortgage, and it filed a foreclosure proceeding in which Louis Olivero, (the purchaser from Union Bank following the first foreclosure, remember ?) was made a party defendant. Olivero filed a motion to dismiss contending that React needed to redeem the first mortgage prior to filing the foreclosure of its second mortgage under the reasoning set forth in a pre-IMFL case, Baldi v. Chicago Title & Trust Co., (1983) 133 Ill.App.3d 29, and the trial court granted this motion – from which this appeal was taken.

Noting that "Illinois law provides for both statutory and equitable rights of redemption.", and that prior to IMFL a junior mortgagee who was not made a party to the foreclosure of a senior mortgage had a "general equitable right to redeem which was distinct from any statutory right…", the Third District decision here begins by stating that under the current law, React has no statutory right to redeem except under the limited circumstances set forth in Section 1402 involving a consent judgment. This is distinct from the law when Baldi was decided, (1983); a time when any person interested in the property could redeem within six months from the sale under the statute. Under IMFL effective in 1987, while the legislature intended to preserve the equitable right of redemption, the time period during which it could be exercised is limited by Section 15-1603, and it expires prior to a judicial sale pursuant to Section 15-1507. Accordingly, both the equitable and statutory redemption rights of React expired after the original judicial sale on July 10, 2002 – apparently without regard to whether it was a party to the suit or not. Turning then to the issue of whether React could foreclose without redeeming the senior mortgage, the court states that "Several provisions of the Foreclosure Law compel us to find that this is the proper conclusion." The junior mortgagee is not a necessary party to the senior mortgage foreclosure under Section 15-1501. A junior mortgagee may intervene under Section 15-1105 and be bound by the litigation. Any mortgagee, who is not a party to or bound by a lis pendens relating to the litigation has the right to file a separate foreclosure proceeding under Section 15-1501. The statutory right to file a separate action under Section 15-1501, the court holds, is "dispositive", and not withstanding Baldi or the decision in Orloff v. Petak, (1992), 224 Ill.App.3d 638, (decided under IMFL), "It is evident, therefore, that the Foreclosure Law has superceded the prior rule which made foreclosure by the junior mortgagee dependent on redemption. Accordingly, the trial court improperly denied plaintiff's complaint for foreclosure and we remand…"

(Ed. Note. I'm not certain, but I think this decision leaves the litigants on their way back to the trial court with Olivero's motion to dismiss being reversed and React permitted to proceed with foreclosure of its junior mortgage lien. React no longer has either an equitable or statutory right to redeem the first mortgage. React also argued that Olivero was barred from attacking the validity of its mortgage under the doctrine or res judicata and collateral estoppel, but the decision here did "not consider plaintiff's alternative arguments concerning res judicata and estoppel." So, this case could be the source of further appeal before the entire scenario is painted.)

2. ATTORNEYS; CONVEYANCING ERRORS AND MALPRACTICE:

Catherine Tuchowski sued her transactional real estate lawyer, Elizabeth Rochford, for malpractice in Tuchowski v. Rochford, (1st Dist., October, 2006), http://www.state.il.us/court/Opinions/AppellateCourt/2006/1stDistrict/October/1050491.pdf . Rochford represented Tuchowski in the sale of her residential property in November, 2000. The Tuchowski property at the time of the closing consisted of three contiguous lots. A home stood on two of the lots, and the third, adjacent lot was vacant, but for a shed and outdoor grill. The controversy involved the fact that the deed of conveyance prepared by Rochford for Tuchowski's signature at the closing conveyed all three lots for the contract price of $575,000, whereas Tuchowski alleged she only intended and directed the sale to include the house and two lots on which it stood, and not the third lot. Tuchowski claimed that she had hoped to sell the third, vacant lot separately to the owners of an adjacent parcel for $125,000, and did not discover the third lot was conveyed by the sale in 2000 until September 2003. Rochford moved to dismiss the complaint as not being filed timely; within two years. The trial court granted the motion and also gave

Tuchowski leave to file an amended complaint. The amended complaint alleged that Rochford knew that the owners of the adjacent property had offered Tuchowski $125,000 for the vacant lot, that Tuchowski was 77 years old at the time of the closing, and that she relied entirely upon Rochford in preparing the documents. At the closing Rochford directed Tuchowski to sign the documents as quickly as possible because Rochford had another closing to attend, and Tuchowski did so based upon Rochford's direction rather than carefully reading the documents. Rochford's responsive pleading revealed that the contract originally only included the house and two lots, and that Rochford offered to amend the contract to include the third lot in a letter to the purchaser's attorney. Rochford stated that this was pursuant to Tuchowski's direction. Tuchowski denied any such direction. The letter from Rochford to the purchaser's attorney amending the contract to include the third lot did not reveal that a copy was sent to Tuchowski. The deed of conveyance signed by Tuchowski set forth three distinct permanent tax identification numbers, and Rochford argued that Tuchowski must have or should have known that all three lots were being conveyed by that fact. The trial court dismissed Tuchowski's amended complaint pursuant to Section 2-619, holding that Tuchowski should have know from the closing documents at the time that she sold all three lots, and failed to timely file the case. Tuchowski appealed, and the First District reversed and remanded.

The Appellate Court's decision to reverse the dismissal turns on its belief that Tuchowski reasonably relied upon Rochford when she signed the closing documents and deed without carefully reading them and discovering the conveyance of the third lot. Given this finding, the issue of whether Tuchowski should have discovered the malpractice and filed timely (within two years of the closing or when she knew or should have known of the error), was one that required findings of fact rather than law and resulted in a remand. "Usually courts hold parties responsible for knowing the contents of documents they have signed. However, under certain circumstances, especially in cases involving fiduciary relationships courts have excused ignorance of the content of such signed documents" The fact that Rochford was, for some period of time, a successor trustee of Tuchowski's trust is mentioned in the decision, but clearly not an operative fact. It is her position as an attorney in the transaction that results in the fiduciary duty. Further, the delay in filing was related to the "discovery rule", which "takes into account the sophistication of the plaintiff in the particular area of knowledge." Here, Tuchowski relied upon Rochford, did not review the documents carefully because her attorney was hurrying to another closing, and did not have a reason or opportunity to discover the error until three years later when she went to sell the third lot. Whether Tuchowski should have understood or known from the three permanent index numbers on the deed above her signature that three lots were being conveyed by her at the time was a fact upon which a trier could differ; whether she "did not understand the special significance of the sequence of digits slashes, dashes and spaces on that line" in the deed should not have been resolved by a motion to dismiss. The allegations of the complaint were "sufficient to support an inference that Rochford breached her duties as Tuchowski's attorney and she breached her contract to represent Tuchowski's interest."

3. MORTGAGE FORECLOSURE: TENDER OF PAYMENT BY A "BONDED BILL OF EXCHANGE":

Every few years there arises another "new idea" propounded by "patriots" in response to mortgage foreclosures by lenders. The most recent is the subject of U.S. Bank v. Phillips, (1st Dist., June, 2006), http://www.state.il.us/court/Opinions/AppellateCourt/2006/1stDistrict/June/1051829.pdf . U.S. Bank

brought a mortgage foreclosure based on a payment default and served Anthony Phillips personally. An order of default and judgment were entered when Phillips failed to appear or answer the complaint.

As the redemption period was running, Phillips sent a letter to the servicer of the loan purporting to tender payment in full of the balance of the loan by an enclosed "Bonded Bill of Exchange". The document stated that "the obligation of the… Secretary of Treasury arises out of the want of consideration for the pledge and by the redemption of the pledge under HJR-192, Public Law 73-10 and 307 U.S. 247, 59 S. Ct. 847, 93 L.Ed. 1266.", and attached instructions on how to process the bill with the United States Treasury based on the "Personal Treasury UCC Contract Trust Account" Phillips purported to have established. On its face, the "Bill" stated it was a negotiable instrument. A few days after the mailing, Phillips received a notice of sale based on the judgment. In response, he filed a "Motion to Vacate Sale with Prejudice" alleging that the mortgage debt had been satisfied by the tender of the Bill, regardless of whether or not the lender had failed to process the tender. Thereafter, the foreclosure sale proceeded, the Plaintiff purchased the property, and the trial court confirmed the sale.

Prior to his eviction, Phillips filed a second motion entitled "Petition to Vacate a Void Judgment and Collateral Attack Under Authority of Illinois Statutes", (characteristically titled in a manner which reeks of the sophistry typical of such efforts), in which he claimed the judgment was void because of his tender of the Bonded Bill of Exchange" and discharge. The trial court rejected the theory and denied the petition.

On appeal Justice McBride acknowledged that there were no cases on point in Illinois, but noted that the California Appellate Court had dealt with a "Bonded Bill of Exchange Order" that was "virtually identical to the Bill at issue in this appeal" in McElroy v. Chase Manhattan Mortgage Corp. As in the California factual pattern, the Bill before the Court here was not a negotiable instrument because it was not "payable to the order or to bearer." The Bill was not a check because it was not drawn upon a bank under the UCC. (810 ILCS 5/3-104(c). The "sources" identified in the Bill, ("JR-192, Public Law 73-10 and 307 U.S. 247, 59 S. Ct. 847, 93 L.Ed. 1266"), as being the basis for the purported obligation of the Secretary of the Treasury failed to establish or create any obligation. "The Bill is nothing more than words strung together on a piece of paper which lack any cohesive meaning and convey nothing….defendant did not tender "payment" but, rather a piece of paper that was entirely lacking in value." Accordingly, the trial court's denial of the petition to vacate was affirmed.

4. JUDGMENT ENFORCEMENT, FRAUDULENT CONVEYANCES AND JOINT TENANCY:

There case has a very interesting interplay between the application of the Illinois Uniform Fraudulent Transfer Act (740 ILCS 160/1) and the law on Joint Tenancy in Gayton v. Kovanda, (1st Dist., October, 2006), http://www.state.il.us/court/Opinions/AppellateCourt/2006/1stDistrict/October/1060609.pdf , that, in the end, simply proves how important "timing" really can be.

Monica and Joseph Gayton owned real estate in Wilmette, Illinois as joint tenants. Louis Kovanda was a creditor of Joseph's. In February, 2001, Joseph transferred the Wilmette property to Monica by quitclaim deed. Thereafter, Kovanda obtained a $414,000 judgment against Joseph on November 20, 2003. Joseph died on November 26, 2003. Kovanda perfected his judgment by recording a memorandum against the title to the Wilmette property on December 3, 2003. Monica filed a suit to quiet title against Kovanda, stating the he had wrongfully recorded the judgment against her property because she was the sole owner pursuant

to the quit claim, and since the Kovanda judgment was solely against Joseph who no longer had an interest in the property, it did not constitute a lien. Kovanda counter sued Gayton, alleging that Joseph's transfer of title was a fraudulent attempt to hinder, delay or defraud him as a creditor in violation of the Fraudulent Transfer Act. The trial court granted summary judgment in favor of Monica, and Kovanda appeal. The First District affirmed.

The decision begins by reciting the elements of the Fraudulent Transfer Act; a transfer with an actual intent to hinder, delay or defraud creditors, without receipt of reasonably equivalent value, while the debtor had assets which were relatively small in relation to a business or transaction which resulted in the debtor having debts beyond his ability to pay. Turning to the element of "intent" , and noting that the 2001 transfer here was to an "insider", while Joseph retained possession or control, at a time when the debtor had been sued or threatened with suit by Kovanda, rendering him "insolvent", the Court presumed the transfer was fraudulent under the Act, and then turned to the effect of the voiding of the quitclaim deed as a fraudulent conveyance. Although Kovanda argued that as a fraudulent transfer, the quit claim must be avoided rendering the title to the property being held as tenants in common based on a violation of the four unities required to support joint tenancy, the Court disagreed. While "A joint tenancy can be severed when one tenant voluntarily or involuntarily destroys one of the four unities (interest, time, title and possession) that are crucial to the creation and continuance of a joint tenancy.", a fraudulent conveyance is void only as against creditors and the result is the conveyance is treated as if it had not been made." The result of the Court treating the property as if the fraudulent conveyance had not been made here, however, was not to render the title to that of tenants in common in 2001, but have the title remain in joint tenancy until Joseph's death. Joseph's death acted to transfer title to Monica by operation of law as the surviving joint tenant, and this occurred before Kovanda recorded his memorandum of judgment. "It is of no consequence that Kovanda obtained the judgment prior to Joseph's death because a judgment only becomes a lien on the real estate of the person against whom it is entered from the time the judgment is filed with the recorder of deeds in the county in which the property is located." Since Kovanda did not record his judgment until after Joseph's death and the title had passed to Monica as the surviving joint tenant, summary judgment quieting her title as to Kovanda was affirmed.

5. MORTGAGE FORECLOSURE; UNKNOWN HEIRS AND DEVISEES:

"How Do You Foreclose a Dead Man's Mortgage ?" That was the issue addressed by Judge Simko in a recent mortgage foreclosure bench ruling in the Circuit Court of Cook County --- with a surprising result that could significantly alter the foreclosure process when a decedent is involved. (Wells Fargo v. McQueen, (Cir. Ct. of Cook County), Case No. 2005 CH 12846.)

Wells Fargo's residential mortgage was made by Allen McQueen in 2003. McQueen died on August 18, 2004, and the monthly payments went into default in May, 2005. There was no will filed of record and no probate estate opened according to the clerk of the circuit court. Wells Fargo's attorneys filed a foreclosure complaint on August 1, 2005, naming as parties the decedent, Allen McQueen, The Estate of Allen McQueen, (which there was none), Unknown Heirs and Legatees of Allen McQueen, Unknown Owners and Non-Record Claimants, and Allen C. McQueen, (a known son of Allen McQueen). After the judgment was entered by default based upon publication notice, the sale held and confirmed, the son, Allen C. McQueen presented a motion to vacate the judgment and related orders based on "invalid service".

Judge Simko granted the motion and wrote an opinion in which "the Court raised the issue of subject matter jurisdiction, principally in light of Keller v. Walker, (3rd Dist. 2001), 319 Ill.App.3d 67, and finding that a foreclosure case is a "*quasi in rem*" proceeding which requires suing the mortgagor or a person claiming through a mortgagor "for jurisdiction purposes". Furthermore, naming "unknown heirs and legatees" "could hardly satisfy the requirement of suing a mortgagor". A "deceased person cannot be a party to an action and any action commenced against a dead person is a nullity and invokes no jurisdiction of the court", Judge Smiko wrote, citing Keller v. Walker. Suggesting that the lender "might seek to establish jurisdiction by ..way of section 13-209 (appointment of a representative) or take a different course altogether including pursuing review of today's dismissal – which is strongly encouraged – is beyond the scope of this Order."

In the past, plaintiff's attorneys in foreclosure when confronted with a deceased mortgagor have searched for surviving joint tenant, then looked for a probate estate to establish heirship and a representative of the estate, or, as a last resort, named unknown heirs and devisees of the deceased mortgagor as a party and published notice. (In fact one regular practitioner in the foreclosure arena routinely makes "unknown heirs and devisees" of mortgagors a party in apparent anticipation of a decedent in the chain of title, although this is a very questionable practice.) This procedure had been approved by title companies issuing minutes of foreclosure title commitments in the past, but it is not likely this practice will continue at this juncture. Judge Simko's holding that a "deceased person cannot be a party to an action and any action commenced against a dead person is a nullity and invokes no jurisdiction of the court", unless and until appealed, appears to leave foreclosure plaintiffs no alternative but to appoint a decedent's representative in their foreclosure case pursuant to Section 13-209 of the Code of Civil Procedure.

6. MORTGAGE FORECLOSURE; DAMAGES IN TORT FOR MORTGAGE FRAUD FOLLOWING FORECLOSURE:

There can be no doubt that the incidence of mortgage fraud is on the rise and that we will be seeing more litigation by lenders against their brokers, appraisers, borrowers, attorneys and title companies when the actual damages resulting from loans that should not have been made are foreclosed and deficiencies become known. For this reason, as well as some wonderfully clear discussion of the impact of foreclosure sale credit bidding on establishing damages, the decision in Freedom Mortgage Corp. v. Burnham Mortgage, Inc., (N.D. Il., March, 2006), Case No. 03 C 6508, https://ecf.ilnd.uscourts.gov/cgi-bin/login.pl is well worth reading.

Freedom Mortgage brought this action against its mortgage broker, Burnham, the title company, (Exeter), the title insurance underwriter, (Ticor), and the title company agent, (attorney Jeffrey Hlava), alleging a breach of contract, fraud, negligent misrepresentation, RICO, breach of fiduciary, negligence and civil conspiracy claims arising out of mortgages made by Freedom on nine separate properties in Cook County, Illinois as a result of an alleged an mortgage fraud scheme. The properties were residential, and Freedom provided purchase money mortgage financing to borrowers based on appraisals which "grossly exaggerated" the value of the properties and did not comply with ordinary industry standards. The borrower's mortgage applications also contained misrepresentations of the financial and other information which were "designed to make the deals appear legitimate and the Borrowers appear creditworthy". The Borrowers quickly defaulted and the various properties were foreclosed; uniformly by default when the

Borrowers failed to appear. Based on the judgments, the properties were sold at foreclosure sales with Freedom being the successful bidder based on "credit bids" that varied from "full debt bids" resulting in no deficiency to "specified bids" resulting in deficiency judgments on six of the nine properties in a total sum of $585,955.08. Following the confirmation of the sales, Freedom sold the nine properties to third parties for sums which all resulted in significant losses ranging from $58,520.94 to $252,513.52, and totaled $1,1154,121,68 – for which it brought this suit against the defendants.

At issue in this interlocutory appeal was whether Freedom Mortgage would be limited in its damages to the balance due on its aggregated deficiencies, ($585,955.08), or whether it could seek damages in the far greater sum of its actual losses when the premises purchased at sale were subsequently sold to third party bidders for an actual loss of $1,154,121.68; a consequence of the Defendant's underlying fraud. The Defendants contended that Freedom's damages should be limited by the amount of the deficiency in each case that it bid at sale, and that it was collaterally estopped from claiming damages greater than those established in the foreclosure sales. Freedom's theory of the case focused on the fraud perpetrated upon it, and it argued that holding it bound by its credit bid when seeking recovery for the underlying fraud would result in unfairness to it as the victim/party being estopped. The Northern District's opinion held in favor of the Defendants, and provides a comprehensive review of mortgage foreclosure law relating to sales and credit bidding.

There were no issues relating to the alleged fraud scheme or the conduct of the mortgage foreclosures. The decision begins with a survey of fundamental principals of mortgage foreclosure, credit bidding and deficiency judgments. Tracing the law of default judgments and foreclosure sales, the Court notes that "Credit bidding' is the practice of allowing a foreclosing lender to bid on the property at the auction, as the Plaintiff did in this case, with respect to each of the Properties… The foreclosing lender is allowed to credit bid in order to avoid the inefficiency of requiring the lender to tender case which would only be immediately returned to it." A "full credit bid" occurs when the lender bids the full sum to which it is entitled under the judgment, and "Most states, including Illinois, hold that a lender is deemed to have received repayment of a loan in full if, at a foreclosure, it successfully bids the full amount of the loan (the 'Full Credit Bid Rule'). Because a mortgagee is entitled to one satisfaction of his debt and no more, the bidding in [full] of the debt to purchase the mortgage property, thus cutting off lower bidders, has always constituted a satisfaction of the debt." At the confirmation of sale, the mortgagee can petition the court for a deficiency judgment based on the difference between the sale price and the debt owed, and "the price at which the property is sold is deemed to be the conclusive measure of its value for purposes of setting a deficiency judgment." The amount a mortgagee bids at sale is "conclusively held to the price bid as a full equivalent for and satisfaction of his lien, and having received the proceeds of sale, he becomes a mere stranger to the property."

Turning to the Second Circuit decision applying Michigan law in Chrysler Capital v. Grella, the court noted that there a lender who bid the full amount of its debt at a foreclosure sale was held to no longer have an action against the borrower. The Second Circuit specifically refused to carve out an exception where the lender alleged that the underlying transaction was the product of the borrower's fraud, finding that "the important policy of finality at foreclosure sales must prevail in these circumstances…[to] protect [borrowers] from deficiency actions after the foreclosure sale and bring certainty to the foreclosure proceedings." The Second Circuit's rejection of the argument that strict application of the rule would promote unfairness and serve to reward the fraudulent conduct was also embraced by the Northern

District of Illinois here, noting that "the [lender] may always limit his damage from fraud by bidding for the security no more than its fair market value…[and] to allow [a lender], after effectively cutting off or discouraging lower bidders, to take the property and then establish that it was worth less that the bid, encourages fraud, creates uncertainty as to the [borrower's] rights, and most unfairly deprives the sale of whatever leaven comes from other bidders." An important distinction was noted in contrary decisions where the lender did not discover the fraud until after its credit bid had been made. Only where the lender could show that its credit bids were a proximate result of the defendant's fraud should it not be precluded from recovering damages without regard to the specific amount of the credit bids. This did not occur here, where Freedom was aware of the fraud prior to the sale and bid based upon its own independent, post judgment appraisals of the property. Since the lender's credit bids were not proximately caused by the defendant's fraud, but based on its own appraisals, knowing full well what had occurred, the Full Credit Bid Rule applies so that the limit of damages was the remaining deficiency after the credit bids. Freedom was bound and collaterally estopped by its credit bit from claiming any further damages beyond the deficiency amounts, and it would be limited to the deficiency rather than the alleged ultimate losses after post-sale liquidation of the properties.

7. FORCIBLE ENTRY AND DETAINER; JURISDICTION BY POSTING:

In Equity Residential Properties v. Nasolo, (1st Dist., March, 2006), http://www.state.il.us/court/Opinions/AppellateCourt/2006/1stDistrict/March/1050610.pdf , the tenant, Nasolo, attacked the jurisdiction of the trial court to enter an order for possession based on posting notice, lost in the trial court, but won a reversal on appeal.

Nasolo's primary contention on the appeal was that the landlord did not make sufficient effort at serving her personally before posting. The record indicated that after filing suit for non-payment of rent, the landlord placed summons with the Sheriff. The return of service revealed that four different deputies attempted to serve Nasolo at the rented apartment on four different occasions without success. The last return remarked that the reason the tenant was not served was "moved" and that the apartment appeared to be "vacant". Based on this, the Plaintiff's attorney filed an affidavit stating that Nasolo could not be found so that process could be served upon her, and that her place of residence "upon diligent inquiry cannot be ascertained." The Forcible Entry and Detainer Act provides that if the plaintiff is unable to obtain personal service, an affidavit may be filed stating that on due inquiry the defendant cannot be found, the last place of residence, or if that place is unknown, that upon diligent inquiry it can not be determined, to support constructive notice by posting followed by mailing notices. Here a judgment for possession was entered ex parte based on this limited jurisdiction. ("The statute further specifies that notice by posting conveys limited jurisdiction to the court: 'However, in cases where the defendant…is notified by posting…and the defendant…does not appear generally, the court may rule only on the portion of the complaint which seeks judgment for possession…")

Nasolo's argument was that she had been generally available for personal service at the apartment (except for the time during which she was working, 8:00 am to 8:00 pm weekdays and occasionally on weekends) and at her work address disclosed to the Landlord in the rental application she had provided. She argued in the trial court that the Landlord could have and should have done more to serve her before resorting to posting notice. The Landlord in turn argued that the numerous efforts by the deputies and its own management agents sufficiently demonstrated that Nasolo was not amenable to process and posting notice

was necessary. The trial court agreed with the Landlord, but the First District Appellate Court thought otherwise.

"Every defendant…is entitled to receive the best possible notice of the pending suit and it is only where personal service of summons cannot be had, that substituted or constructive service may be permitted…Securing jurisdiction by constructive service 'is a concession of the law to the hard circumstance of necessity…only allowable in certain limited cases, and then only after strict compliance with the statutes governing such service… The phrases 'due inquiry' and 'diligent inquiry' in that statute are not intended as useless phrases but are put there for a purpose…Superficial efforts at complying with the statute will not suffice…Instead the law 'requires an honest and well-directed effort to ascertain to ascertain the whereabouts of a defendant by an inquiry as full as the circumstances can permit…Depending upon the particular circumstances of a case, inquiring with neighbors, inquiring with known counsel, checking court records, and investigating employment information may be part of a 'due inquiry' and 'diligent inquiry' required of a plaintiff intending to rely on constructive service." The party claiming jurisdiction by posting notice has the burden of proof of strict compliance with the statute to confer jurisdiction. Here, the record suggested that the Landlord did not make due or diligent inquiry, and could have at least attempted service on the tenant at her known place of employment, but did not do so before resorting to posting. While there were affidavits from agents of the Landlord's management agent indicating that they had contacted Nasolo and she knew that she was in arrears on her rent, had mailed a certified letter to her at her work place, and contact with her during which she made partial tenders of her rent accompanied by promises to pay the balance, the Court viewed these inconsequential: "More importantly, a defendant's actual knowledge that an action is pending or that service has been attempted is not the equivalent of service of summons and would not relieve the plaintiff of its burden or vest the court with jurisdiction." Faced with two cases on this issue reaching different conclusions, (Household Finance v. Volpert, 227 Ill.App.3d 453, and First Federal Savings and Loan Ass'n v. Brown, 74 Ill.App.3d 901), the Court's decision here analyzes each case in some detail and determines that "the more analogous case is Brown, (citation), where the sheriff's return of service suggested further investigation was warranted, but he plaintiff did nothing more…Instead of investigating…the mortgage lender [in Brown] sought constructive service by publication and obtained a default judgment order…[creating] a significant issue with respect to the truthfulness of the affidavit filed by the plaintiff's attorney for service by publication…We find the circumstances are analogous to Brown's and that an evidentiary hearing is warranted here", and vacated the Order entered against Nasolo and remanded the case for hearing.

(Ed. Note: This decision, while within the context of Forcible Entry and Detainer, notes that much of the precedent relied upon relate to constructive service by newspaper publication pursuant to Section 5/2-206 of the Code of Civil Procedure in foreclosure and other types of proceedings, but specifically states that "this authority is nevertheless generally relevant here.")

8. TITLE INSURANCE; STATUTE OF LIMITATIONS ON ACTIONS BY TITLE INSURANCE COMPANY AGAINST ITS AGENT IS CONTROLLED BY TWO YEAR CONTRIBUTION AND INSURANCE STATUTES RATHER THAN THE TEN YEAR WRITTEN CONTRACT PERIOD:

The case of United General Title Insurance Company v. Amerititle, Inc., (1st Dist., March, 2006), http://www.state.il.us/court/Opinions/AppellateCourt/2006/1stDistrict/March/1051874.pdf, came to the Court on an interlocutory appeal of two certified questions:

"1. In an action where the plaintiff, a title insurance underwriter, claims that the defendant, a title insurance agent, breached its contractual obligation to indemnify the plaintiff, and seeks indemnification for its alleged costs, pursuant to the terms of a written ` Title Policy Issuing Agreement' entered into by and between the parties, does the two-year statute of limitation set forth in Section 13-204(a) of the Code applicable to all actions for contribution or indemnity apply and preempt all other statutes of limitation (735 ILCS 5/13-204(a) and (c) (2004)), or does the ten-year statute of limitation on written contracts set forth in Section 13-206 of the Code (735 ILCS 5/13-206 (2004)) apply?

2. In an action by the plaintiff, a title insurance underwriter, against the defendant, a title insurance agent, for breach of a written `Title Policy Issuing Agreement' (Agreement) as a result of a claim made on a loan policy issued by the defendant pursuant to that Agreement, does the two-year statute of limitation set forth in Section 13-214.4 of the Code (735 ILCS 5/13-214.4 (2004)) applicable to `[a]ll causes of action brought by any person or entity under any statute or any legal or equitable theory against an insurance producer... concerning the sale, placement [or] procurement . . of ... any policy of insurance' apply and preempt all other statutes of limitation, or does the ten-year statute of limitation on written contracts set forth in Section 13-206 of the Code (735 ILCS 5/13-206 (2004)) apply?"

The First District responded and answered the certified questions as follows:

"1. The two-year statute of limitations set forth in sections 13-204(a) and (c) of the Code of Civil Procedure (735 ILCS 5/13-204(a), (c) (West 2004)), applicable to all causes of action for contribution or indemnity, applies and preempts all other statutes of limitation in this instant matter where a title insurance underwriter claims that a title insurance agent breached its contractual obligation of indemnification to the insurance underwriter.

2. The two-year statute of limitations set forth in section 13-214.4 (735 ILCS 5/13-214.4 (West 2004)), applicable to all causes of action brought by any entity against an insurance producer concerning the sale, placement or procurement of any insurance policy applies, in this instant matter and preempts all other statutes of limitation where a title insurance underwriter brings a cause of action against a title insurance agent resulting from a claim made on a loan policy issued by the insurance underwriter."

The facts of the case where that Amerititle, as agent for United General, issued a loan policy insuring Washington Mutual Bank as the holder of a first and prior mortgage executed by Joseph Czech upon real estate, title to which was actually held in a land trust, rendering the mortgage lien unenforceable against the real estate. When Washington Mutual's loan default, it filed a claim on the title insurance, and United General prosecuted a foreclosure action against Czech, claiming the mortgage was actually an "equitable mortgage" on the premises. In the foreclosure case, American Family Financial Services came forth with a mortgage executed by the land trustee in its favor that predated the Washington Mutual mortgage. United General purchased the American Family mortgage and paid other monies to ensure Washington Mutual's mortgage was an enforceable lien on the premises. It then filed suit against Amerititle based on breach of the Title Policy Issuing Agreement. Amerititle responded with a motion to dismiss the United General suit as time barred, alleging that the action was one for contribution or indemnity governed by Section 13-204 and 13-214.4 relating to actions against insurance producers, both of which must be brought within two

years; (indemnity or contribution within two years of payment in discharge of liability to the claimant, and United General's position was that the action was one to enforce a written contract, governed by the ten year limitation in Section 13-206 of the Code of Civil Procedure.

The Court's ultimate position is clear from its opening statement that "The focus of this appeal is to determine whether the general statute of limitations applicable to written contracts applies in the instant case or whether two other more specific statutes apply, with one statute more specific than the other." The operative principals of statutory construction apply, with the finer point that "when both a general and specific statute exists regarding the same subject, 'the specific provision controls and should be applied [citation] unless it appears that the legislature intended to make the general act controlling." Finding that the true nature of United General's complaint was one for indemnity rather than a breach of contract action, the Court notes that Section 13-204 specifically provides that it "shall apply to all actions for contribution or indemnity and shall preempt, as to contribution and indemnity actions only, all other statutes of limitation or repose." Likewise, rejecting United General's argument that it rather than Amerititle issued the policy of insurance, and therefore the matter did not relate to the sale, placement, procurement, renewal or cancellation of an insurance policy as required by Section 13-214.4, the Court also rejected the theory that United General's claim arose from Ameritile's failure to properly search and report the chair of title as required by its contract and not based on the insurance policy. Citing the holding in Indiana Insurance Co. Machon & Machon, (2001), 324 Ill.App.3d 300, that the "statutory language of section 13-214.4 ' as written is unequivocal and subject to only one reasonable interpretation: that *all* causes of action brought by *any* person or entity under *any* theory against an insurance producer shall be brought within two years of the date the cause action accrues." Here, the position of Ameritile was as an "insurance broker" in the title transaction, and therefore it fell within the statutory reference to "insurance producer" for the purposes of Section 3-214.4.

Accordingly, even though United General's position that Amerititle breached its contract by its failure to properly underwrite the policy of insurance, causing United General to satisfy Washington Mutual's claim, giving rise to Amerititle's contractual obligation to indemnify United General for resolving the title issues, the nature of the liability was indemnity not contractual, but indemnification based on an insurance transaction, and "the fact that the origin of a cause of action may ultimately be traced to a writing has never been sufficient, standing alone, to automatically warrant application of the period of limitations governing written contracts.".

(Ed. Note: All the while I was reading and re-reading this case, I kept trying to put the recent Stewart Title case relating to the Moorman doctrine and finding that title insurance companies are providing insurance and not "information" relating to the chain of title to real estate in providing title insurance into perspective. I thought I was pretty clear on this issue, (unhappy with the result, but 'clear'). Now, I'm not so certain…and certainly not so clear. But, of course, this decision considers simply the issue of limitations, not the underlying substance…)

9. MORTGAGE FORECLOSURE; CONFIRMATION OF SALE AND THIRD PARTY BIDDERS REDUX:

In Mortgage Electronic Registration Systems, Inc. v. Jerry Thompson, (1st Dist. November, 2005), http://www.state.il.us/court/Opinions/AppellateCourt/2006/1stDistrict/November/1052720.pdf , the trial

court's decision not to confirm the foreclosure sale of property to a third party bidder was affirmed despite the argument that the effect would be to destabilize judicial sales.

The Thompson's residential mortgage was foreclosed and a sale held at which a third party bidder, Cronus Projects, Inc., was the successful bidder. Nonetheless, the Thompsons entered into a contract to sell the real estate and obtained a payoff letter directly from their lender, (without knowledge of the plaintiff's attorney in the pending foreclosure), in the period between the sale and confirmation. At the confirmation hearing, the trial court refused to approve the sale, finding that approval of sale would violate Section 15-1508 in that "justice would not otherwise be done", ordered that the sale bid be returned to Cronus, and ordered that the third party be awarded damages; (later determined to be $1,000 for attorney's fees and $940.00 representing interest on the bid during the time it was held by the sale officer). The third party bidder appealed.

The facts further indicate that at the hearing to confirm the sale it was determined that the amount tendered by the Thompsons to the lender between the sale and hearing date was $32 less than the total amount due. Arguing that that sale and payoff occurred subsequent to the foreclosure sale and the lis pendens was recorded, the third party focused on the effect of the trial court's decision in "destabilizing judicial sales". The First District's focus, however, was on whether the refusal of the trial court to confirm the sale was an abuse of its discretion. Noting that the trial court "acted consistently with the policy of Illinois foreclosure law that favors the protection of equity in the home of a mortgage and allows redemption.", and that the First District had previously held that "We recognize and acknowledge the need to promote stability in the conduct of a judicial sale. (citations)" The Court's decision emphasizes: "However that policy can not be given ascendancy over the articulated purpose of the Illinois Mortgage Foreclosure Law to protect the equity of a mortgagor by permitting mortgage redemptions prior to forced sales and thereby to protect against the forced sale of property at prices well below fair market value." Further noting that the payoff of the mortgage by the Thompsons facilitated the satisfaction of two other liens on the real estate that would have been extinguished by the foreclosure sale and trial court balanced the interests of the Thompson's purchasers in addition to the preservation of their equity, the Appellate court stated: "Although we might not have come to the same conclusion as the circuit court in this case, we cannot say that it acted arbitrarily, without conscientious judgment or ignored principals of law resulting in substantial prejudice"; i.e., the trial court did not abuse its discretion.

Turning to the issue of the trial court's award of damages to the sale bidder, the First District notes that the theories of tortuous interference with its rights and loss of prospective economic advantage were raised by the sale bidder for the first time on appeal and therefore waived. Nonetheless, noting that prior case law holds that "it is well established law that the high bidder's 'interest evaporates upon the trial court's determination that the sale will not be confirmed…[and]…What the trial court decides to do with the property once it determines the sale will not be confirmed is a matter in which the [high bidders] have no discernable interest. <u>Citicorp</u>, 269 Ill.App.3d 301.", the Appellate Court clearly signals how it would have ruled had the issue not been waive. Likewise, the Plaintiff argued in its response brief that the trial court erred in its award of attorney's fees and interest in favor of Cronus, but the Court declined to rule on this issue in that it was not the subject of a cross appeal by the plaintiff, and therefore also waived.

10. POTPOURRI:

When to Order a Title Endorsement:

There has been a continuing discussion among real estate and estate planning attorneys on the ISBA Listserve relating to whether or not a new title policy should be issued upon the conveyance of property into a trust for estate planning purpose. The "issue" is that raised from time to time is based on the fact that a conveyance generally terminates title coverage as the title passes from the insured to another entity. In the past, the "best practice" has been to request that the title company issue an endorsement insuring the trust. A recent question was raised on the ISBA Listserve about the impact of the NEW (!) ALTA policy forms: "Has CT&T adopted the new ALTA form (June '06) so that a trust created for estate planning purposes would automatically be an insured under the original policy?" To which Dick Bales responded: "Good point. As I understand it, Chicago Title will be adopting these new policies. Note that in this new ALTA owner's policy, the definition of "insured is expanded to include "a grantee of an insured under a deed delivered without payment of actual valuable consideration conveying the title . . . if the grantee is a trustee or beneficiary of a trust created by a written instrument established by the Insured named in Schedule A for estate planning purposes. Dick Bales" One less thing to keep us all up at night !

The Science of Drafting Deeds:

Another question that seems to continually crop up on the ISBA List Serve relates to attorneys whose sole involvement in a real estate transaction is the preparation of a deed. Myles Jacobs's post on the List Serve cited the applicable ISBA Ethics Opinion in context:

"Maria:

Here is one suggestion which will not take a month. If you client has the old deed, why not have it re-recorded with a legend to indicate that it is being re recorded to correct the previous recording indicating the prior conveyance was of a half interest only. As for the attorney who made the mistake and no feels he has no obligation to correct his error, the ARDC would be a good starting place. There is an ISBA opinion I believe it is 94-1 which clearly states that an attorney is responsible for more than just the preparation of a deed. He can't hide behind the screen that he was only asked to prepare a deed. Any disclaimer his client signed would not absolve him of this error. Myles Jacobs"

If that remark left you wondering just what is going on, Dick Bales' thought in response surely will make you go "oohhhhh":

"This discussion reminds me of a true situation; it illustrates the hidden perils of deed draftsmanship.

Here are the facts: Farmer owns a one-half interest in a farm. He wants to convey this interest to a purchaser. The contract demands that he deliver a warranty deed. Is there a problem if Farmer prepares a deed, wherein he states that he "conveys a one-half interest in the following described real estate . . . .?"

Yes, to me there is a problem. One might consider this to be ambiguous. If Farmer owns a half interest, by noting on the deed that he is conveying a half interest, could one argue that he is actually conveying a half interest of what he owns, or a 1/4 interest, and still retains the other fourth interest?

When I was given this situation, I suggested that it might be better to word the deed something like as follows:

“Farmer conveys all of grantor’s interest in the following described real estate, being an undivided one-half interest, situated in the county of Madison, described as follows: . . . .”

In another similar situation, the conveyance was from one family member to another, and so a quit claim deed was used that was not limited to a percentage of ownership interest. Dick Bales”

Who says real estate closing attorneys don’t have any “challenges” ???

On the Transfer Tax Front:

Most of us know that the City of Chicago requires a water and zoning certification, Berwyn, Cicero and Lyons mandate a code compliance inspection, don’t try to get a transfer tax in Park Ridge if you have over-due library books, and now….

Joe Fortunato recently notified me that the Village of Glen Ellyn has implemented a new inspection requirement. Beginning October 1, 2006, no real estate transfer tax stamp can be sold unless the interior of a home has first been inspected to confirm that there are no illegal sump pump connections to the sanitary sewer system.

IRELA has posted an advisory regarding the new requirement on the IRELA web site (www.irela.org). It is on the opening page, below the *"Next Meeting"* description. There is also a link there to the PDF version of the Glen Ellyn "Clearwater Removal Program" notice for those who desire more information.

The “newest” Real Estate Scam:

An article in the October, 2006 ISBA Bar News pointed out that the Recorder of Deeds of Cook County, Eugene Moore, is alerting lawyers to scams which may impact their real estate clients. The first scam involves letters sent to unwary senior citizens suggesting that something may be wrong with the title to their home and they had better investigate. The method suggested to do this is to order a “certified” copy of the deed to their property at a cost of $150.00. Of course, the same document can be viewed on-line without cost (www.ccrd.info) and a hard copy obtained for less than $1.00. The second alert is an increase in the recording of quit claim deeds involving real estate owned by seniors. The Recorder believes that this often happens in situations that involved elder abuse, and Moore’s office is now notifying the grantor when a quitclaim deed is filed to make certain that the owner signed and delivered the deed intentionally. If there is a question about a possible transaction, individuals or their lawyers can contact the Recorder in Cook County at (312) 603-5050. The newly expanded public access to the records via the internet is the foundation of the concern, and Moore stated to the ISBA News that “there are persons who will abuse this privilege to take advantage of others, which we intend to mitigate as much as possible.”